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No. ~~80-939~~

In the Supreme Court of the United States

October Term, 1980

NATIONAL REPUBLICAN SENATORIAL COMMITTEE

~~and~~

~~FEDERAL ELECTION COMMISSION~~,

Petitioners,

vs.

DEMOCRATIC SENATORIAL CAMPAIGN COMMITTEE,

Respondent.

PETITION OF NATIONAL REPUBLICAN SENATORIAL COMMITTEE FOR A WRIT OF CERTIORARI

To the United States Court of Appeals
For the District of Columbia Circuit

JAN W. BARAN
WILLIAM H. SCHWEITZER
REBECCA L. JACKSON
LEE LEVINE
BAKER & HOSTETLER
818 Connecticut Avenue, N.W.
Washington, D.C. 20006
(202) 861-1500
Counsel for Petitioner National Republican Senatorial Committee

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—TEL. (216) 621-5647

QUESTIONS PRESENTED FOR REVIEW

1. Did the Court of Appeals err in conducting a *de novo* review of the Federal Election Commission's decision to dismiss an administrative complaint and in failing to defer to the established policy of the agency?

2. Does 2 U.S.C. § 441a(d)(3) prohibit agreements through which state committees of a political party designate the senatorial campaign committee of the same party as the agent of the state committees to make authorized expenditures in support of the party's candidates for election to the United States Senate?

3. Does 2 U.S.C. § 441a(d)(3), if construed to prohibit these agency agreements, violate the First Amendment by infringing upon rights of political expression and association?

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Respondent.

PETITION OF NATIONAL REPUBLICAN SENATORIAL COMMITTEE FOR A WRIT OF CERTIORARI

To the United States Court of Appeals
For the District of Columbia Circuit

Petitioner, National Republican Senatorial Committee, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit entered in this proceeding on October 9, 1980.

OPINIONS BELOW

The opinion of the Court of Appeals and the opinion of the United States District Court for the District of Columbia, not yet reported, appear in the Appendix hereto. The Appendix also contains the certification of the vote of the Federal Election Commission and its First General Counsel's Report in this proceeding.

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia Circuit was entered on October 9, 1980. A timely petition for rehearing *en banc* was denied on October 11, 1980, and this petition for certiorari is filed within 90 days of that date. The jurisdiction of this Court is invoked under 2 U.S.C. § 437g (a)(9) and 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment I:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

United States Code, Title 2:

§ 441a

(d) *Expenditures by national committee, State committee, or subordinate committee of State committee in connection with general election campaign of candidates for Federal office.*

(1) Notwithstanding any other provision of law with respect to limitations on expenditures or limitations on contributions, the national committee of a political party and a State committee of a political party, including any subordinate committee of a State committee, may make expenditures in connection with the general election cam-

paign of candidates for Federal office, subject to the limitations contained in paragraphs (2) and (3) of this subsection.

(2) The national committee of a political party may not make any expenditure in connection with the general election campaign of any candidate for President of the United States who is affiliated with such party which exceeds an amount equal to 2 cents multiplied by the voting age population of the United States (as certified under subsection (e) of this section). Any expenditure under this paragraph shall be in addition to any expenditure by a national committee of a political party serving as the principal campaign committee of a candidate for the office of President of the United States.

(3) The national committee of a political party, or a State committee of a political party, including any subordinate committee of a State committee, may not make any expenditure in connection with the general election campaign of a candidate for Federal office in a State who is affiliated with such party which exceeds—

(A) in the case of a candidate for election to the office of Senator, or of Representative from a State which is entitled to only one Representative, the greater of—

(i) 2 cents multiplied by the voting age population of the State (as certified under subsection (e) of this section); or

(ii) $20,000; and

(B) in the case of a candidate for election to the office of Representative, Delegate, or Resident Commissioner of any other State, $10,000.

STATEMENT OF THE CASE

The National Republican Senatorial Committee ("NRSC") is a unit of the Republican Party organized in 1948 by Republican members of the United States Senate specifically to support Republican senatorial candidates. Its counterpart, the Democratic Senatorial Campaign Committee ("DSCC"), is a political committee composed of 21 Senators of the Democratic Party which regularly supports senatorial candidates of that party.

In 1980 the Republican National Committee ("RNC") and the Democratic National Committee ("DNC") each executed written agreements designating NRSC and DSCC respectively as their agents for the purpose of making expenditures up to the limits contained in 2 U.S.C. § 441a (d) (3), a provision of the Federal Election Campaign Act of 1971, as amended ("FECA").[1] RNC entered into a similar agreement with NRSC in 1978

Section 441a(d)(3) limits expenditures by the national or a state committee of a political party "in connection with the general election campaign of" a candidate for Congress. Under § 441a(d)(3), these committees "may not make any expenditures" in connection with the campaign of a candidate for United States senator which

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1. 2 U.S.C. §§ 431-55 (1976 & Supp. III 1979) (originally enacted as Federal Election Campaign Act of 1971, Pub. L. No. 92-225, § 301, 86 Stat. 11, as amended by Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, § 201, 88 Stat. 1272; Federal Election Campaign Act Amendments of 1976, Pub. L. No. 94-283, § 101, 90 Stat. 475; and Federal Election Campaign Act Amendments of 1979, Pub. L. No. 96-187, § 101, 93 Stat. 1339) [hereinafter cited to 2 U.S.C. unless otherwise indicated].

exceed the greater of $20,000 or "2 cents multiplied by the voting age population of the State."[2]

In 1980 NRSC and DSCC made expenditures on behalf of, and as agents for, RNC and DNC respectively in senatorial campaigns. In accordance with the agency agreements, these funds have been used to finance communications and general campaign activities in support of the election of Republican and Democratic senatorial candidates.

In 1978 a number of state committees entered into similar written agency agreements with NRSC. Accordingly, in the course of the 1978 senatorial campaigns, NRSC spent $2,770,995 as agent for RNC and several Republican state committees, a figure well within the aggregate limitations contained in § 441a(d)(3) for expenditures by these committees. After the 1978 campaign, the Federal Election Commission ("FEC") decided, on two separate occasions, that NRSC's agreements with these state committees were entirely consistent with § 441a(d)(3). *In re National Republican Senatorial Committee,* Federal Election Commission Matter Under Review 820; *In re National Republican Senatorial Committee,* Federal Election Commission Matter Under Review 780. In 1980 a number of state committees again entered into agency agreements with NRSC.

On May 9, 1980 DSCC filed an administrative complaint with the FEC alleging that NRSC's agreements in 1978 and 1980 with state committees violate § 441a(d)(3). The complaint did not challenge the identical agreement

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2. 2 U.S.C. § 441a(d)(3). With respect to campaigns for election to the House of Representatives, the expenditure limitation contained in § 441a(d)(3) is $10,000 per general election campaign. It does not apply to party expenditures on behalf of presidential candidates, which are governed by § 441a(d)(2). This latter provision is not at issue in this case.

between NRSC and RNC.[3] After reviewing an extensive report prepared by its General Counsel,[4] the FEC dismissed the complaint on July 11, 1980 by a vote of 6-0. The FEC concluded that there was "no reason to believe" that the agreements violated § 441a(d)(3).[5]

On July 30 DSCC filed a petition for review in federal district court for the District of Columbia pursuant to 2 U.S.C. § 437g(a)(8) requesting a declaratory judgment that the FEC's decision was contrary to law. On August 28 the district court, which had previously denied NRSC's motion to intervene, granted the FEC's motion for summary judgment and concluded that the FEC's decision was not "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Democratic Senatorial Campaign Committee v. Federal Election Commission*, No. 80-1903, at B4 (D.D.C. Aug. 28, 1980) (page citation to Petitioner's Appendix *infra*).

On September 4 DSCC docketed its appeal of the district court decision in the United States Court of Appeals for the District of Columbia Circuit. The Court of Appeals granted NRSC leave to intervene on September 22. Following oral argument before Chief Judge Wright and Judges Wilkey and Ginsburg, the Court of Appeals reversed the decision of the district court on October 9 in a *per curiam* opinion. Judge Wilkey dissented.[6]

The Court of Appeals concluded that, in the absence of explicit statutory authorization, the agreements between

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3. *See* Democratic Senatorial Campaign Comm. v. FEC, No. 80-274, at A5 (D.C. Cir. Oct. 9, 1980) (*per curiam*) [hereinafter cited as *DSCC v. FEC* with page citations to Petitioner's Appendix, *infra*].

4. *See* Petitioner's Appendix, *infra*, at D1.

5. *Id.* at C1.

6. *See id.* at A1.

NRSC and the state committees violate § 441a(d)(3). As a result, NRSC's expenditures in support of senatorial candidates exceed the limitations contained in § 441a(d)(3). Accordingly, the court declared the FEC's failure to act on DSCC's complaint "contrary to law," and ordered the FEC to "conform" to its decision "forthwith."[7] Moreover, rather than permit its mandate to issue 21 days after entry of judgment as is customary under *Fed. R. App. P.* 41, the court, *sua sponte*, ordered the mandate to issue "forthwith."[8] On October 10 NRSC filed a petition for rehearing with a suggestion for rehearing *en banc* and an application to recall the mandate. Both motions were denied by the Court of Appeals on October 11.[9]

Having exhausted all available avenues of relief in the Court of Appeals, NRSC applied on October 16 to the Chief Justice of the United States for an order to stay enforcement of the judgment below, pending disposition of its petition for a writ of certiorari. *See* 28 U.S.C. § 2101(f) (1976). On October 17 the Chief Justice entered an order temporarily granting the application. Following a motion by DSCC on October 17, the full Court declined to vacate the stay on October 21. DSCC filed a motion for "expedited consideration" on October 27 which the Chief Justice denied as "moot" on October 28. As a result, the stay entered by the Chief Justice on October 17 and reviewed by the Court on October 21 remains in effect. The FEC filed a petition for a writ of certiorari on December 10, 1980.

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7. *Id.* at A19. The judgment directs the FEC to remedy the claimed violation of § 441a(d)(3) through an investigation under 2 U.S.C. § 437g. In the event the FEC fails to "conform" with the judgment, DSCC may itself seek judicial enforcement against NRSC. 2 U.S.C. § 437g(a)(8)(C).

8. *See DSCC v. FEC*, at E1.

9. *See* Petitioner's Appendix, *infra*, at F1.

REASONS FOR GRANTING THE WRIT

The Court of Appeals is the first court to find that § 441a(d)(3) prohibits state committees of political parties from designating senatorial campaign committees as their agents for purposes of making expenditures. The decision is not supported by the language of the statute. It reverses three previous FEC rulings upon which both major political parties relied in structuring spending on behalf of their candidates. The Court of Appeals holding restricts the First Amendment rights of political expression and association without advancing a legitimate governmental interest.

In voting not to vacate the stay of enforcement of the judgment of the Court of Appeals, the full Court determined that four Justices would be likely to vote for certiorari. *See Graves v. Barnes*, 405 U.S. 1201, 1203 (1972). Having met this initial burden, NRSC submits that this Court should grant this petition and review the decision of the Court of Appeals.

A. The Court Of Appeals De Novo Review Of The FEC's Decision To Dismiss DSCC's Complaint Conflicts With The Standard Of Limited Judicial Review Provided In FECA And Fails To Defer To The Established Policy Of The FEC.

FECA provides that the FEC has exclusive jurisdiction[10] over enforcement of the statute. 2 U.S.C. § 431c (b)(1).

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10. Congress gave the FEC "exclusive primary jurisdiction with respect to the civil enforcement of federal election laws." H.R. Conf. Rep. No. 94-1057, 94th Cong., 2d Sess. 35, *reprinted in* Legislative History of Federal Election Campaign Act Amend-

(Continued on following page)

The District of Columbia Circuit has previously recognized that the express congressional grant of exclusive jurisdiction entitles FEC decisions "to great respect by the courts because of the extremely delicate nature of the tremendous power entrusted to it." *In re Carter-Mo..dale Reelection Committee, Inc.*, [1980] Fed. Elec. Camp. Fin. Guide (CCH) ¶ 9132, at 51,038 (D.C. Cir. Sept. 12, 1980). Judicial restraint is required since the FEC is "vested with a wide discretion in order to guarantee that it will be sensitive to the great trust imposed in it to not overstep its authority by interfering unduly in the conduct of elections." *Id.; see DSCC v. FEC*, at A20-A21 n.2 (Wilkey, J., dissenting).

As a result, judicial review of the FEC's dismissal or failure to act with regard to a complaint "is limited." *Hampton v. Federal Election Commission*, [1980] Fed. Elec. Camp. Fin. Guide (CCH) ¶ 9036, at 50,439-40 (D.D.C. April 15, 1977), *aff'd mem.*, No. 77-1546 (D.C. Cir. July 21, 1978); *accord, In re Carter-Mondale Reelection Committee, Inc., supra*, ¶ 9132, at 51,038. A court may not substitute its judgment for that of the FEC and may set aside its action only if the FEC acted in a manner "which was arbitrary or capricious, was an abuse of discretion or was otherwise contrary to law." *Hampton, supra*, ¶ 9036, at 50,444; *see* 2 U.S.C. § 437g(a)(8)(C); *DSCC v. FEC*, at A20 (Wilkey, J., dissenting).

The Court of Appeals declined to engage in a limited review of the FEC's decision to dismiss DSCC's complaint

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Footnote continued—

ments of 1976, at 1029 (1977). Any complaint "bottomed on an alleged violation" of the campaign financing laws is within the "exclusive competence" of the FEC, and "all other tribunals must therefore 'yield to the primary jurisdiction'" of the agency. H.R. Rep. No. 94-917, 94th Cong., 2d Sess. 4, *reprinted in* Legislative History of Federal Election Campaign Act Amendments of 1976, at 804 (1977).

on the basis that this case does not involve a discretionary exercise of FEC power, but an interpretation of a federal statute. *DSCC v. FEC*, at A8. However, the rule requiring limited review of FEC action previously enunciated in the District of Columbia Circuit extends to actions involving interpretation of the federal election laws. *See, e.g., In re Carter-Mondale Reelection Committee, Inc., supra*, ¶ 9132, at 51,037; *Hampton, supra; Gelman v. Federal Election Commission*, [1980] Fed. Elec. Camp. Fin. Guide (CCH) ¶ 9130, at 51,020 (D.C. Cir. July 18, 1980), *cert. denied*, 49 U.S.L.W. 3227 (U.S. Oct. 6, 1980) (No. 80-209). The *de novo* review conducted by the Court of Appeals in the instant case conflicts with the previous decisions in the District of Columbia Circuit[11] and creates confusion regarding the role of the courts in reviewing FEC actions.

In addition to failing to engage in a limited review, the Court of Appeals erred by refusing to defer to the FEC's interpretation of its governing statute and to recognize that its First General Counsel's Report provided a basis for the FEC's decision. In a recent case involving construction of the federal election laws, the District of Columbia Circuit affirmed the importance of deferring to the FEC's past practices, especially where, as here, "its interpretation is supported by the language and overall purpose of the statute being construed." *Gelman, supra*, ¶ 9130, at 51,020-21; *accord, DSCC v. FEC*, at A20 n.1 (Wilkey, J., dissenting). A district court in this Circuit has previously deferred to a report of the FEC General Counsel as providing a rational and defensible basis for an FEC determination not to investigate a complaint.

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11. Since 2 U.S.C. § 437g(a)(8)(A) limits petitions to review FEC dismissals of complaints to the United States District Court for the District of Columbia Circuit, the question regarding the scope of judicial review of FEC dismissals or non-action with regard to complaints would arise only in the District of Columbia Circuit.

See Hampton, supra, ¶ 9036, at 50,440. The Court of Appeals decision conflicts with these previous decisions and is erroneous.[12]

B. The Court Of Appeals Erred In Construing 2 U.S.C. § 441a(d)(3) To Prohibit State Committees Of A Political Party From Designating The Senatorial Campaign Committee Of The Same Party As The Agent Of The State Committees For Purposes Of Making Expenditures In Support Of The Party's Senatorial Candidates.

Section 441a(d) provides that "[*n*]*otwithstanding any other provision of law with respect to limitations on expenditures*" or contributions, the national and state committees of a political party may make *expenditures* in support of the party's senatorial candidates of up to 2 cents per voting age resident. 2 U.S.C. § 441a(d) (emphasis added). The prefatory language establishes that national and state committees have broad authority to make expenditures in support of senatorial candidates in amounts in excess of those allowed for other entities under 2 U.S.C. § 441a.

As the Court of Appeals acknowledged, the provision does not contain any reference to arrangements whereby state committees delegate their authority to make expenditures in support of senatorial candidates. *DSCC v. FEC,* at A13. The plain language of § 441a(d) does not prohibit delegation of spending authority. The Court of Appeals erred in reading such a prohibition into the statute.

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12. Recent decisions of this Court recognize the importance of deference to administrative agencies. *See* Whirlpool Corp. v. Marshall, 445 U.S. 1, 11 (1980); Ford Motor Credit Co. v. Milhollin, 444 U.S. 555, 559 (1980); Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519, 544-49 (1978).

The legislative history of § 441a confirms that Congress did not intend to prohibit state committees from delegating spending authority to senatorial committees under § 441a(d). Section 441a(d) was originally proposed in 1974 as part of S. 3044, § 304,[13] which contemplated total public financing of all general election campaigns for federal office. Even under this proposed system of public financing, Congress sought to preserve "the role of political parties in private financing for federal candidates." S. Rep. No. 93-689, 93d Cong., 2d Sess. 7, *reprinted in* Legislative History of Federal Election Campaign Act Amendments of 1974, at 103 (1977). Congress approved state and national committees as "pooling resources" for "many small contributors" that would provide "substantial private funding" for federal candidates. *Id.* The purpose of § 441a(d) was to "preserve the place of political parties in the elective process." *Id.* at 111.[14] Since the senatorial and congressional committees were in existence many years prior to 1974, Congress was familiar with their role in private campaign financing for federal candidates[15] and was acting to preserve that role through § 441a(d). By construing § 441a(d) to prohibit agency agreements, the Court of Appeals decision interferes with the ability of political parties to structure funding to pro-

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13. The Senate version of this provision was adopted by the Conference Committee, S. Conf. Rep. No. 93-1438, 93d Cong., 2d Sess. 56, *reprinted in* Legislative History of Federal Election Campaign Act Amendments of 1974, at 947 (1977), and ultimately passed by Congress, *id.* at 1122.

14. *See* 120 Cong. Rec. 8120 (Mar. 26, 1974), *reprinted in* Legislative History of Federal Election Campaign Act Amendments of 1974, at 212 (1977) (outline of S. 3044 submitted by Senator Kennedy) (purpose of § 441a(d) was to "assure continuity of normal functions of political parties, to provide an independent role for the parties in general elections and to offer an additional opportunity for private contributions").

15. *See* 2 U.S.C. § 434(d) (1976) (repealed Pub. L. No. 96-187, § 104, 93 Stat. 1348 (1979)).

vide the most effective advocacy for their candidates and thereby conflicts with the clear intent of Congress.

The Court of Appeals also erred by failing to construe FECA as a whole in order to effectuate its purpose and give meaning to each section. *See Weinberger v. Hynson, Westcott & Dunning, Inc.*, 412 U.S. 609, 631-32 (1973); *accord, Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979). The clear purpose of § 441a is to eliminate undue and corrupting influences on candidates by limiting contributions. *Buckley v. Valeo*, 424 U.S. 1, 25 (1976); *DSCC v. FEC*, at A34 (Wilkey J., dissenting). Subsections (a)(1), (2) and (3) of § 441a limit contributions by persons,[16] multi-candidate committees and individuals to political committees established by national political parties and to candidates for federal office. Once political party committees receive these limited contributions, the purpose of § 441a is not advanced by prohibiting transfers between national, state or local committees of the same party.[17] As a result, Congress stated in § 441a(a)(4) that the contribution limits of § 441a(a)(1), (2) and (3) "do not apply to transfers between and among political committees which are national, state, district, or local committees (including any subordinate committee thereof) of the same political party." 2 U.S.C. § 441a(a)(4).

National senatorial committees may make unlimited transfers under § 441a(a)(4) to national, state, or local committees of the same party. *See DSCC v. FEC*, at A32 (Wilkey, J., dissenting). The legislative history of § 441a(a)(4) confirms that Congress intended to permit

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16. "Person" is defined at 2 U.S.C. § 431(11).

17. DSCC v. FEC, at A35 (Wilkey, J., dissenting); *see* discussion *infra* at 17-20.

senatorial campaign committees to make such transfers.[18] Since § 441a(a)(4) authorizes unlimited transfers between and among national senatorial committees and other party committees, it follows that construing § 441a(d)(3) to prohibit agency agreements conflicts with § 441a(a)(4), destroys the harmony of the statutory scheme of § 441a and does not effectuate its purpose.[19] This Court should correct the plainly erroneous construction of the Court of Appeals.

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18. The conference committee report on the 1976 Amendments, which included § 441a(a)(4), makes it clear that in relation to the contribution limitations of § 441a the senate and house campaign committees are national committees of the same political party. S. Conf. Rep. No. 94-1057, 94th Cong., 2d Sess. 58, *reprinted in* Legislative History of Federal Election Campaign Act Amendments of 1976, at 1052 (1977); DSCC v. FEC, at A32 n.16 (Wilkey, J., dissenting).

19. *See* DSCC v. FEC, at A35-A37 (Wilkey, J., dissenting); FEC Advisory Opinion 1976-108, [1980] Fed. Elec. Camp. Fin. Guide (CCH) ¶ 5236 (Feb. 15, 1977). Continued congressional concern regarding the ability of political parties to structure their own finances is evidenced by consideration and ultimate rejection in 1978 of H.R. 11315. Section 313 of that bill contained language that would have prohibited any "movement of funds" between "the political committees of a national political party (including house and senate campaign committees of such party) and the political committees of a state political party for the purpose of making contributions to, or expenditures on behalf of any candidate for federal office." The House rejected a rule for consideration of the bill. 124 Cong. Rec. H2261-69 (daily ed. Mar. 21, 1978).

The basis for the rejection is reflected in various comments attacking the bill. Congressman Mikva remarked that he "deeply regretted that the committee in its wisdom saw fit to change the party financing." *Id.* at H2265. Congressman Stockman urged defeat of the bill stating that the proposed legislation was a "fundamental assault on the very integrity, the continued viability, the continued meaningful role of our political parties." *Id.* at H2264; *see* note 24 *infra*.

Overt acts of Congress are significant in determining legislative intent. *See, e.g.*, Gulf Oil Corp. v. Copp Paving Co., 419 U.S. 186, 199-201 (1974); Tennessee Valley Auth. v. Hill, 437 U.S. 153, 181-85 (1978). The rejection of H.R. 11315 and the debate in connection with that action evidences congressional intent to leave the structuring of funding in relation to federal candidates up to each political party and its committees. *See* Pipefitters Local Union No. 562 v. United States, 407 U.S. 385, 412-13 (1972).

C. The Court Of Appeals Decision Restricts Political Expression And Association Protected By The First Amendment Without Furthering Any Legitimate Governmental Interest.

1. The Court of Appeals interpretation of 2 U.S.C. § 441a(d)(3) restricts constitutionally protected rights of political expression and association.

Section 441a(d)(3) operates in an area at the core of the First Amendment guarantee of free expression. *Buckley v. Valeo*, 424 U.S. 1, 14 (1976), proceeds from the premise that "[d]iscussions of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our constitution." In *Buckley*, this Court recognized that a "restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression." *Id.* at 19. By limiting campaign contributions and expenditures, FECA "constitutes a restriction on communication . . . since virtually all meaningful political communications in the modern setting involve the expenditure of money." *Id.* at 11.

Section 441a(d)(3) also implicates the freedom of political association protected by the First Amendment. *Id.* at 15. Freedom of association, and hence effective political advocacy, is affected by § 441a(d)(3)'s limitations on the ability of individuals to "pool money through contributions, for funds are often essential if 'advocacy' is to be truly or optimally 'effective.'" *Id.* at 65; *accord, Common Cause v. Schmitt*, Nos. 80-1609 & 80-1754, slip op., at 14 (D.D.C. Sept. 30, 1980) (three-judge court).

The agency agreements at issue in this case facilitate the exercise of these First Amendment rights. The state and national committees of the major political parties enter

into these agreements in order to enhance their political expression by utilizing the financial resources and national political expertise of NRSC. The effectiveness of political expression is maximized in a number of ways by designation of NRSC to make § 441a(d)(3) expenditures, including "economy of scale in expenditures from one source, . . . available expertise in creating and placing advertisements, . . . obtaining media exposure, [and] obtaining credit during the campaign." *DSCC v. FEC*, at A28-A29 (Wilkey, J., dissenting). NRSC is able to "pool money from individuals who are interested in politics and amplify their shared viewpoint into an efficient political message," *Common Cause, supra*, slip op. at 14.

The Court of Appeals incorrectly assumed that no First Amendment interests are implicated by reading § 441a(d)(3) as prohibiting the agency agreements at issue here. *DSCC v. FEC*, at A13-A14 n.28. But, as Judge Wilkey noted in his dissent, "the majority fails to grasp the significance of *Buckley*," which held that *"both"* contributions and expenditures "are in the First Amendment area." *Id.* at A39 n.27 (Wilkey, J., dissenting) (emphasis in original).

The First Amendment interests involved in this case are much greater than those implicated by the individual contribution limits discussed in *Buckley*. In *Buckley*, this Court reasoned that a limit on the amount of a political contribution to a candidate was of comparatively *less* constitutional significance than an independent expenditure limitation because a "contribution serves as a general expression of support for the candidate and his views, but does not communicate the underlying basis for the support." 424 U.S. at 21. In this sense, the "quantity of communication does not increase perceptibly with the size of [the] contribution." *Id.*

Here, in contrast, a prohibition of NRSC's agency agreements with state committees will directly decrease the *quantity* and the *quality* of the party's political expression by depriving state committees of the ability to enter into agency agreements with NRSC which can more effectively advocate their views. Unlike direct contributions to candidates where "the transformation of contributions into political debate involves speech by someone other than the contributor," *id.*, expenditures by NRSC at the behest of state committees involve political expression by the Republican Party itself.[20] This expression is entitled to extensive constitutional protection especially since the FEC has barred party committees, including NRSC, from making "independent" expenditures. *See* 11 C.F.R. § 110.7(b)(4) (1980).[21]

2. The Court of Appeals interpretation of 2 U.S.C. § 441a(d)(3) does not further a legitimate governmental interest.

The Court of Appeals decision burdens the First Amendment interest in effective political expression and

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20. This Court confronted a similar situation in *Buckley*, with respect to expenditures by a candidate on his own behalf. *See* 424 U.S. at 52 n.58. The Court of Appeals had held that such expenditures should be treated as "contributions" by the candidate to himself, subject to FECA's strict limitations on contributions. This Court rejected such an analysis because "unlike a person's contribution to a candidate, a candidate's expenditure of his personal funds directly facilitates his own political speech." *Id.* Similarly, expenditures by a political party in support of a candidate are more than symbolic manifestations of support for that candidate—they "directly facilitate" party advocacy of its candidates.

21. While other political associations and individuals can spend unlimited amounts for political speech, including advocacy of a particular candidate's election, *see* California Medical Ass'n v. FEC, No. 79-4426, slip op. at 9 (9th Cir. May 23, 1980), *review pending*, 49 U.S.L.W. 3207 (U.S. Oct. 7, 1980) (No. 79-1952), all political party expenditures in support of congressional candidates are subject to the limitations contained in § 441a(d)(3).

association. The court's construction of § 441a(d)(3) can only be supported if it serves a "compelling governmental interest." *Buckley, supra,* 424 U.S. at 44-45; *Cousins v. Wigoda,* 419 U.S. 477, 489 (1975). In *Buckley,* this Court held that the only sufficiently compelling governmental interest in this area is "the prevention of corruption and the appearance of corruption spawned by the real or imagined coercive influence of large financial contributions on candidates' positions and on their actions if elected to office." 424 U.S. at 25; *accord, Common Cause, supra,* slip op. at 9.

The Court of Appeals does not and could not claim that its reading of § 441a(d)(3) is necessary to stem incipient political corruption. "[T]here is no visible evil in any 'undue influence' by a political party on its own nominated candidate." *DSCC v. FEC,* at A38 (Wilkey, J., dissenting). The more an individual candidate is beholden to his own political party for a substantial portion of his campaign funds, the less vulnerable he is to individual pressure groups. *Id.* at A36.[22] Any possibility that a candidate would be unduly influenced by a contributor to his political party is effectively prevented by § 441a(a)(1)(B), which limits the size of such contributions. As in *Buckley,* "[t]he interest in alleviating the corrupting influence of large contributions is served by the Act's contribution limitations and disclosure provisions, rather than

22. In *Buckley,* this Court employed a similar analysis of the alleged governmental interest supporting limits on a candidate's expenditure of his personal funds. The Court determined that there is no threat of corruption or apparent corruption when a candidate expends his personal funds. 424 U.S. at 53. "Indeed, the use of personal funds reduces the candidate's dependence on outside contributions and thereby counteracts the coercive pressures and attendant risks of abuse." *Id.* Political party expenditures, which also raise no question of potential corruption, may serve an analogous function by fixing the candidate's allegiance firmly to his party, a wholly salutary result.

by . . . campaign expenditure ceilings." 424 U.S. at 55; *accord, Common Cause, supra,* slip op. at 10.

Since the governmental interest in preventing corruption is irrelevant to § 441a(d)(3), the Court of Appeals asserted that its reading of the provision is necessary to encourage the development of "vigorous state party organizations." *DSCC v. FEC,* at A5. Nowhere in the legislative history is there any suggestion that Congress intended to create any special role for state committees under § 441a (d)(3).[23] Even if such an intent could be discerned, it does not rise to the compelling level necessary to support a restriction on political expression and association such as the Court of Appeals interpretation of § 441a(d)(3).

In the last analysis, the only interest served by an interpretation of § 441a(d)(3) to prohibit agency agreements is the suppression of political party expression. In adopting this interpretation, the Court of Appeals has implicitly determined that it is somehow "unfair" for NRSC to engage in effective political fundraising and advocacy when DSCC has been unable, through its own efforts, to render equally effective services to Democratic candi-

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23. This paucity of relevant legislative history stands in bold contrast to the 1979 amendments to FECA in which Congress clearly expressed an intention to assist state committees by passing new legislation exempting them from limits on expenditures for so-called "grassroots" activities. In passing these amendments, unlike § 441a(d)(3), Congress clearly stated that it intended "to encourage volunteers to work for and with local and state political party organizations." H.R. Rep. No. 96-422, 96th Cong., 1st Sess. 9, *reprinted in* [1979] *U.S. Code Cong. & Ad. News* 2860, 2868. Assuming that such a congressional intent did exist, however, the agency agreements at issue here are in no way at odds with a desire to foster the role of state committees. Under § 441a(d)(3), a state committee retains the power to spend its allotted funds or to designate an agent, such as NRSC, to act on its behalf. The state committee has sole discretion to decide in what manner party funds will be most effectively utilized, and it is in no way compelled to designate an agent if it does not wish to do so.

dates.[24] Yet, the desire to equalize the resources and thereby the expression of political parties is forbidden by the First Amendment. *Buckley* plainly states that the constitutional guarantee of free political expression "denies government the power to determine that spending to promote one's political views is wasteful, excessive, or unwise." 424 U.S. at 57.

3. Since the Court of Appeals interpretation of 2 U.S.C. § 441a(d)(3) restricts constitutional rights without furthering any legitimate governmental interest, such an unconstitutional construction should be avoided.

The Court of Appeals construction of § 441a(d)(3), which overruled the district court and the unanimous FEC, is at odds with both the plain meaning of the statute and the First Amendment requirements articulated in *Buckley*. In a case such as this, where First Amendment rights are at stake, it is incumbent upon a reviewing court to interpret the statute at issue to permit the maximum amount of unrestrained political expression possible in light of the legislative purpose. *See Califano v. Yamasaki*, 442 U.S. 682, 693 (1979); *DSCC v. FEC*, at A39 (Wilkey, J., dissenting); *Federal Election Commission v. Central Long Island Tax Reform Immediately Committee*, No. 79-3014, slip op. at

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24. The legislative history of H.R. 11315, § 313, *see* note 19 *supra*, is illustrative. The practical effect of this legislation would have been to render the agency agreements at issue here illegal. Both Democrats and Republicans, however, recognized that the provision was intended solely to deprive the Republican Party of its ability to engage in effective fundraising and political advocacy. *See generally*, 124 Cong. Rec. H2261-69 (daily ed. Mar. 21, 1978). According to Representative Davis, the bill "says that our [Democratic] Party has not done its job in fulfilling its obligation to raise money. So what do we do? We come in and we try to place limitations on it. . . . The problem is that our party did not do the job, so we changed the rules in the middle of the ball game." *Id.* at H2266. Ultimately, the Democratic majority withdrew the provision because, according to Majority Leader Wright, "we ought not craft a bill deliberately in a way that would predetermine the outcome of an election as between one party and another." *Id.* at H2268.

1218 (2d Cir. Feb. 5, 1980) (*en banc*) (*per curiam*). The Court of Appeals disregarded this maxim of statutory construction and incorporated into § 441a(d)(3) a novel prohibition of political expression and association, not evident in its plain language.[25] This Court should review this unprecedented construction of § 441a(d)(3) in light of applicable constitutional principles.

CONCLUSION

For the foregoing reasons, Petitioner National Republican Senatorial Committee respectfully prays that a Writ of Certiorari be granted.

Respectfully submitted,

JAN W. BARAN
WILLIAM H. SCHWEITZER
REBECCA L. JACKSON
LEE LEVINE
BAKER & HOSTETLER
818 Connecticut Avenue, N.W.
Washington, D.C. 20006
(202) 861-1500
Counsel for Petitioner National Republican Senatorial Committee

25. The Court of Appeals decision that § 441a(d)(3) prohibits agency agreements places NRSC in the position of violating § 441a, which constitutes a criminal offense punishable by fine and imprisonment. 2 U.S.C. § 437g(d)(1)(A). "Close examination of the specificity of the statutory limitation is required where, as here, the legislation imposes criminal penalties in an area permeated by First Amendment interests." Buckley, *supra*, 424 U.S. at 40-41 (citations omitted). To avoid unconstitutional vagueness, § 441a(d)(3) must contain language that "affords '[p]recision of regulation [that] must be the touch stone in an area so closely touching our most precious freedoms.'" *Id.* at 41 (quoting NAACP v. Button, 371 U.S. 415, 438 (1963)). Under the Court of Appeals construction, § 441a(d)(3) is unconstitutionally vague since it does not, on its face, provide a precise prohibition of agency agreements.

APPENDIX A

Opinion of the United States Court of Appeals for the District of Columbia Circuit

(Decided October 9, 1980)

No. 80-2074

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

DEMOCRATIC SENATORIAL CAMPAIGN COMMITTEE,
Appellant,

v.

FEDERAL ELECTION COMMISSION,
NATIONAL REPUBLICAN SENATORIAL COMMITTEE,
Intervenor.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
(D.C. Civil Action No. 80-01903)

Before WRIGHT, *Chief Judge,* and WILKEY and GINSBURG, *Circuit Judges.*

Opinion for the court *per curiam.*

Dissenting opinion filed by *Circuit Judge* WILKEY.

PER CURIAM: This case calls for construction of the Federal Election Campaign Act of 1971 (FECA) and its

1974 and 1976 Amendments, 2 U.S.C. § 431 *et seq.*[1] Under a provision of the Act that permits the State committees of the political parties to make expenditures on behalf of senatorial candidates,[2] a number of Republican State committees have executed agreements by which they purport to designate the National Republican Senatorial Committee (NRSC) as their agent for purposes of making expenditures up to the legal limits. The Democratic Senatorial Campaign Committee (DSCC) has challenged this practice as contrary to the letter and purpose of the applicable statutory provisions. The DSCC first sought relief by filing a complaint with the Federal Election Commission (FEC), which upheld the legality of the "agency" agreements.[3] Assuming that it must sustain Commission decisions not shown to be arbitrary and capricious, the District Court granted the FEC's motion for summary judgment.[4] Because we believe that both the FEC and the District Court misconstrued the applicable law, we reverse.

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1. The Federal Election Campaign Act (FECA) of 1971, Pub. L. No. 92-225, 86 STAT. 3, was amended by the FECA Amendments of 1974, Pub. L. No. 93-443, 88 STAT. 1263, by the FECA Amendments of 1976, Pub. L. No. 95-216, 91 STAT. 1655, and by the FECA Amendments of 1979, Pub. L. No. 96-187, 93 STAT. 1339. The relevant provisions of the Act are hereinafter cited to the United States Code only; section references are all to Title 2.

2. 2 U.S.C. § 441a(d)(3). The section also authorizes expenditures on behalf of House candidates.

3. The Commission decision in this case, which it designated as Matter Under Review (MUR) 1234, issued on July 10, 1980.

4. The decision of the District Court, rendered August 28, 1980, is printed in the Joint Appendix (JA) at 157.

I. FACTUAL AND PROCEDURAL BACKGROUND

A. *Agency Agreements*

The Federal Election Campaign Act, as amended, imposes limitations on campaign contributions and expenditures by individuals and by various kinds of political committees. Section 441a(d)(3), the provision centrally at issue in this case, provides for campaign spending by State and national committees of the political parties:

> (3) The national committee of a political party, or a State committee of a political party, including any subordinate committee of a State committee, may not make any expenditure in connection with the general election campaign of a candidate * * * which exceeds—
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> * * * * *
>
> (i) 2 cents multiplied by the voting age population of the State * * *.

Although phrased in restrictive terms, Section 441a(d)(3) is in fact a grant of permission: It permits the national and State committees to make expenditures that would otherwise be prohibited.[5]

As it has done in each campaign since 1976, the Republican National Committee has designated the NRSC as its agent, authorized to make the expenditures permitted to the national committee by Section 441a(d) in all senatorial elections.

Various State committees of the Republican Party have also designated the NRSC as their agent under Section 441a(d). As in the case of the national committee, their

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5. *See* brief for appellee at 10 n.5 ("Absent § 441a(d), party committees could make no expenditures whatsoever in connection with the Congressional campaigns of their party's candidates.").

agency agreements purport to transfer to the NRSC spending authority conferred under Section 441a(d)(3).[6] In the 1978 senatorial elections, during which the State committees commissioned the NRSC as their agent for the first time, the NRSC spent a total of $2,770,995 under the combined spending authority of the national and State party committees.[7] Most of the money went into 12 closely contested races, in which the NRSC spent $2,180,499. Of this sum, $1,106,286.60 was attributable to its expenditures as agent for the national committee, the remaining $1,074,213.40 to expenditures as agent of various State committees.

Agency agreements related to 1980 contests purport to authorize the NRSC to spend even larger sums. There are Senate races in 34 States, whose 34 Republican State committees have a composite spending ceiling of $3,487,020.80 under Section 441a(d)(3).[8] A number of these State committees have designated the NRSC as their authorized spending agent. In California alone, the NRSC will be able to spend up to $485,024 as the agent of the State committee, and a total of $970,048 in its capacity as dual agent of the State and national committees. In New York the comparable figures are $379,717.12 and $759,434.24.

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6. A sample "agency" agreement, pursuant to which the Alabama Republican Executive Committee designated the National Republican Senatorial Committee (NRSC) as its agent for making the senatorial campaign expenditures authorized by § 441a(d)(3), appears as Appendix B to the brief for intervenor NRSC.

7. JA 105.

8. JA 106.

B. *Proceedings Before the Federal Election Commission*

On May 9 of this year the Democratic Senatorial Campaign Committee filed a complaint with the Federal Election Commission in which it challenged the legality of the agency agreements entered by the NRSC and the various Republican State committees.[9] In its accompanying memorandum of law,[10] the DSCC argued that the challenged arrangements violate the plain meaning of Section 441a(d)(3), which provides separate spending limits for State and national party committees and makes no reference to agency. The DSCC claimed that a clear purpose of the statutory scheme was to create an incentive to the development of vigorous State party organizations. The DSCC did not challenge the agency agreement between the NRSC and the Republican National Committee, since the FEC at that time interpreted a Commission regulation, 11 C.F.R. § 110.7, to authorize such agreements.[11] Moreover, the DSCC itself has made an agency agreement with the Democratic National Committee.

The Commission dismissed the complaint. Although it gave no reasoned explanation of its decision, the FEC acted after receipt of a report from its General Counsel.[12] The "First General Counsel's Report" stated that this was the third time that a complaint of this kind had come before the Commission. Although it recommended the same

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9. The complaint is reprinted at JA 1-9.

10. Reprinted at JA 19-28.

11. In fact, the regulation authorizes agency agreements only in presidential campaigns. The FEC has since conceded its interpretive error. *See infra.*

12. First General Counsel's Report, July 8, 1980, reprinted at JA 46-57.

result that the FEC had reached in the prior cases,[13] the report suggested that the General Counsel's emphasis shifted over the course of the various proceedings.[14] In the first proceeding the General Counsel had attributed importance to the absence of any express statutory prohibition of agency arrangements. In this case, however, the General Counsel placed greater reliance on an inference of congressional intent apparently drawn from a related section of the Federal Election Campaign Act, Section 441a(a)(4). That provision allows for unlimited transfers of money between and among political committees of the same party, as defined by the statute.[15] Assuming that the NRSC was a committee of the Republican Party within the meaning of Section 441a(a)(4), the General Counsel reasoned that, because the NRSC could lawfully transfer money to the State committees, which the State committees could then spend up to a limit of 2 cents per resident of voting age, the statute must have intended that the NRSC could itself make expenditures up to that limit while acting as the agent of the State committees.[16] The

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13. The FEC had decided the prior cases, designated MUR 780 and MUR 820, in response to complaints about NRSC spending pursuant to "agency" agreements during the 1978 campaigns. The decision in MUR 780 came in response to a complaint by the National Committee for an Effective Congress concerning expenditures during the Montana senatorial campaign of Larry Williams; the FEC apparently acted *sua sponte* in initiating the MUR 820 inquiry into the financing of the senatorial campaign of James Martin of Alabama. The Commission did not come to a decision on either MUR 780 or MUR 820 until after the election. *See also infra.*

14. First General Counsel's Report, *supra* note 12, at 4-5, JA 49-50.

15. Section 441a(a)(4) provides in pertinent part:

> The limitations on contributions contained in paragraphs (1) and (2) do not apply to transfers between and among political committees which are national, State, district, or local committees (including any subordinate committee thereof) of the same political party. * * *

16. *See* First General Counsel's Report, *supra* note 12, at 5, JA 50 (quoting MUR 820) and 8, JA 53.

General Counsel also cited the more general argument that the provision permitting expenditures by the State and national party committees was intended to be "broad"—broad enough to permit the pooling of large numbers of small contributions made to the political parties and their various committees. After receiving the General Counsel's report on July 8, the Commission rendered its judgment on July 10.[17] By a vote of 6-0 it found "no reason to believe" that the NRSC's agency agreements with the State committees violated Section 441a(d)(3). The FEC's summary announcement of the decision did not explicitly adopt the report of the General Counsel.[18]

C. *Proceedings Before the District Court*

The DSCC sought District Court review of the FEC's action.[19] Its petition, filed July 30, 1980, requested a declaratory judgment that the FEC's decision was "contrary to law," on the theory that Section 441a(d)(3) precludes the State committees from assigning their spending limits to the NRSC. Ruling on cross-motions for summary judgment, the District Court decided in favor of the FEC on August 28. The court held that the FEC must prevail unless its action was "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law."[20] Judge June Green found no violation of that standard. The Dis-

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17. JA 58.

18. *See id.* The failure to incorporate the First General Counsel's Report was in accord with usual FEC procedures. *See infra.*

19. Jurisdiction for review in the District Court is provided by 2 U.S.C. § 437g(a)(8). The District Court summarily denied a motion to intervene filed by the NRSC.

20. *Democratic Senatorial Campaign Committee v. FEC*, D. D.C. Civil Action No. 80-1903, Aug. 28, 1980, memorandum opinion at 3, JA 159.

trict Court construed the decision of the FEC as resting on the inference, advanced by the General Counsel, that the transfer of funds provision of Section 441a(a)(4), when read in conjunction with Section 441a(d)(3), revealed a congressional willingness to treat the funds and expenditures of various party committees, including the NRSC, as essentially interchangeable.[21] The DSCC docketed an appeal in this court on September 4, 1980. The NRSC moved to intervene on September 19, and the court agreed to the intervention.

II. STANDARD OF REVIEW

The District Court regarded the decision of the FEC as entitled to extreme deference. We approach the matter differently.

Although a court should undertake only "a very limited review of the exercise of the FEC's discretionary decisions," *In re Carter-Mondale Reelection Committee, Inc.*, ... F.2d ....., ... (D.C. Cir. No. 80-1841, decided September 12, 1980) (slip opinion at 15), we deal in this case, not with a discretionary exercise of Commission power, but with an interpretation of a federal statute. The Supreme Court has long recognized that "the courts are the final authorities on issues of statutory construction" and need not "rubber-stamp" administrative decisions that misinterpret a federal statute. *SEC v. Sloan*, 436 U.S. 103, 118 (1978) (*quoting Volkswagenwerk v. FMC*, 390 U.S. 261, 272 (1968), and *NLRB v. Brown*, 380 U.S. 278, 291 (1965)).

We recognize that special deference to an agency's interpretation of its governing statute is often appropriate. *Cf. Gelman v. FEC*, ... F.2d ....., ... (D.C. Cir. No. 80-

21. *Id.*

1646, decided July 18, 1980) (slip opinion at 9). But the Supreme Court has established that an agency's entitlement to deference depends upon the quality of its determinations.[22] Factors to be considered include " 'the thoroughness evident in its consideration, the validity of its reasoning, [and] its consistency with earlier and later pronouncements.' " *Adamo Wrecking Co. v. United States*, 434 U.S. 275, 287 n.5 (1978) (*quoting Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)). Measured against this standard, the Commission's performance in the matter before us fails to merit the court's substantial deference.

First, the Commission has presented no reasoned explanation of its decision. It merely pronounced that it found "no reason to believe" that the NRSC violated the Act in making expenditures as agent of the national and State committees.[23] We are not even certain whether the Commission endorsed the reasoning of its General Counsel, since the Commission's decision did not explicitly adopt the General Counsel's report and the Commission's own newsletter, the *FEC Record*, has avowed that Commission actions "are not necessarily based on, or in agreement with, the General Counsel's analysis."[24]

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22. *Compare Griggs v. Duke Power Co.*, 401 U.S. 424, 433-434 (1971), *with Espinoza v. Farah Manufacturing Co.*, 414 U.S. 86, 92-96 (1973), *and General Electric Co. v. Gilbert*, 429 U.S. 125, 140-143 (1976).

23. This bare pronouncement reflects consistent Commission practice. After concluding a case the FEC places the relevant documents, including staff reports and recommendations, in a public file. The Commission does not endorse the reasoning of its staff, nor does it offer reasons of its own. *See* Note, *The Federal Election Commission: The First Amendment and Due Process*, 89 YALE L. J. 1199, 1211-1212 (1980).

Failure to adhere to accepted standards of reasoned decision-making not only undermines public confidence but may actually impair the substantive quality of the Commission's performance. *See id.* at 1211. It also deprives a reviewing court of any Commission record on which to base a deferential consideration.

24. *FEC Record*, Oct. 1979, at 4.

Second, even if we were to accept the analysis of the General Counsel as that of the Commission, we would still encounter a troubling absence of consistent reasoning. On two prior occasions, the first January 19, 1979 and the second June 17, 1979, the FEC upheld the legality of NRSC-State committee agency agreements. In those cases, as in the case at bar, the FEC file apparently included a General Counsel's report recommending approval of the challenged agreements.[25] From report to report, Counsel's grounds for his recommendation shifted perceptibly.

In the first case, the General Counsel rested on the absence from the text of Section 441a(d)(3) of an explicit prohibition of agency agreements and on a reading of Section 441a(a)(4) that would permit unlimited transfers of funds from NRSC to the State committees. *See* First General Counsel's Report, *supra*, at 4, JA 49.

In the second proceeding he added a new justification, arguing that a recently promulgated regulation, 11 C.F.R. § 110.7, permitted the national committee of a political party to designate any agent for the purpose of making Section 441a(d)(3) expenditures. Because the goal of that regulation was to promote coordination among party committees, the Counsel reasoned that the State committees should also be permitted to designate spending agents under Section 441a(d)(3). *See* First General Counsel's Report, *supra*, at 5, JA 50.

The present litigation has evidenced three more changes in the position of either the General Counsel or the Commission. First, and most important, the Commission brief in this court disavowed the heavy reliance that the General Counsel once placed on a provision of 11 C.F.R.

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25. The FEC has not supplied copies of those reports. The First General Counsel's Report in the present case, however, refers back to the earlier reports.

§ 110.7. *See* brief for appellee at 9-12. Because the section relied upon, Section 110.7(a)(4), authorizes agents only in connection with presidential campaigns, not congressional contests, the FEC has now conceded that prior citations to the section to sustain the designation of agents in Senate races seriously misconstrued the regulation. Nonetheless, the misconstruction appeared in the First General Counsel's Report made public at the time of the Commission's decision in this case.

In a second significant change, the General Counsel retreated from any substantial reliance on the absence of an express agency prohibition in the text of Section 441a(d)(3). First General Counsel's Report, *supra*, at 4, JA 49. Third, and finally, the General Counsel's report presented a new argument to justify the legality of agency agreements. Once again relying primarily on Section 441a(a)(4), the Counsel appended the corollary claim that congressional failure to amend that section to prohibit transfers of funds by the NRSC constitutes implicit ratification of the Commission's position. *Id.* at 8-11, JA 53-56.

These alterations in grounds for the agency's decision do not warrant our rejection of any individual argument proffered by the General Counsel or the Commission. We are prepared to consider each, in its turn. But the Counsel's shifting positions offer no adequate support for a claim that the Commission's position here is a product of thorough consideration, careful deliberation, and secure judgment. We must decide for ourselves whether the action of the Commission was "contrary to law."[26]

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26. The dissent makes two distinct points concerning the respect the Commission's decision should command. First, the Commission is entitled to deference in construing its own statute. *See* dissenting op. at 1. Second, the court should refrain from upsetting an arrangement supported by "precedent established

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III. EXPENDITURE LIMITATIONS UNDER SECTION 441a(d)(3)

The agency agreements executed by the Republican State committees and the NRSC purport to transfer spending authority conferred by Section 441a(d)(3). Our inquiry into the permissibility of such agreements begins with examination of the statute itself.[27] Accepted principles of construction establish the presumption that the terms of statutes are ordinarily intended to carry their plain meaning. *See SEC v. Sloan, supra; Caminetti v. United States,* 242 U.S. 470 (1917); *March v. United States,* 506 F.2d 1306 (D.C. Cir. 1974).

Footnote continued—

over the lifetime of the practice." *Id.* at 10. The dissent does not weight, indeed it does not mention, the failure of the FEC to provide a consistent, reasoned explanation of the position it has taken. Moreover, the dissent's reliance on "established" precedent hangs by a slender thread. Commission decisions relevant to this case are of recent vintage. Judge Wilkey recites Commission precedent in four numbered paragraphs. *See* dissenting op. at 10-11. Only one of the recitations is squarely in point. The first three paragraphs relate to Commission expressions on delegations by the *national* rather than the State committees. The fourth paragraph invokes the FEC decisions in MURs 780 and 820, the only precedents directly on target. But neither of these matters was decided until 1979. Prior to the District Court opinion in this case, *no* judicial precedent existed. When Congress expressly provides litigants with a right of judicial review, it is not open to the court to shirk its responsibility by invoking an intervenor's reliance on a short course of unreviewed agency actions.

27. Intervenor NRSC appears to believe that we are not entitled to reach this question, being bound instead to hold for the FEC under principles of *res judicata* and collateral estoppel which NRSC contends forbid our hearing the case. *See* brief for intervenor at 10. We are of the view that claim and issue preclusion principles are inapplicable to the present case. Where, as here, the statute provides for judicial review, an agency's decision on a question of law does not control the judgment of an Article III court. *See* RESTATEMENT (SECOND) OF JUDGMENTS § 131, comments a and d, at 32-33, 39 (Tent. Draft No. 7 1980) ("[An] agency determination is no more res judicata in [a judicial] review proceeding than is a trial court judgment res judicata in an appellate court in which it is under appeal.").

The relevant language of Section 441a(d)(3) authorizes "the national committee of a political party, or a State committee of a political party, including any subordinate State committee," to make "any expenditure" of up to 2 cents per voting-age resident on behalf of the party's senatorial candidate. The operative terms are plain and precise. There is no suggestion that Congress chose its language loosely. Section 441a(d)(3) not only designates spending limits with mathematical rigor; it also confers authority to reach those limits on two named committees, both clearly identified by statutory definitions. Section 431(14) defines the "national committee" as "the organization which, by virtue of the by-laws of a political party, is responsible for the day-to-day operation of such political party at the national level." Section 431(15) defines a "State committee" as "the organization which, by virtue of the by-laws of a political party, is responsible for the day-to-day operation of such political party at the State level."

It is obvious that the NRSC is neither the "national" nor a "State" committee of the Republican Party within the contemplation of Section 441a(d)(3). Nor do we understand either the FEC or the NRSC to contend that the NRSC qualifies as a "subordinate committee of a State committee," the third kind of committee to which Section 441a(d)(3) refers. Nor, finally, does the statute make reference to any other kind of permissible arrangement by which the State party organizations might convey their spending authority to any other organization. The plain language of the statute thus seems to preclude any arrangement by which the special authority of a named entity is transferred to another.[28]

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28. The dissent, like intervenor NRSC but unlike the FEC, argues that First Amendment rights of speech and association would be violated if § 441a(d)(3) were construed to deny the

(Continued on following page)

In its brief as an intervenor in this court, NRSC urges the contrary inference. In so doing, it rehearses an argument invoked by the Commission's General Counsel in an earlier case, the same one on which the General Counsel no longer places substantial reliance. *See* First General Counsel's Report, *supra*, at 4, JA 49. According to the NRSC, this court should infer that agency agreements are permissible under Section 441a(d)(3) because the statutory text includes no express prohibition of agency relationships. The NRSC's argument depends for its plausibility on its use of "agency" terminology. The language of Section 441a(d)(3) presumably does not prohibit a State political committee's employment of an agent in the standard legal sense; the failure of the statute to mention agency does not, for example, mean that the State committees may not hire staff authorized to act in their behalf. Against this background of familiar usage, however, it is somewhat misleading to characterize the challenged relationships between the State committees and the NRSC

Footnote continued—
capacity of State committees to assign their statutory authority to the NRSC. Reliance for this argument is placed on *Buckley v. Valeo*, 424 U.S. 1 (1976). That decision held unconstitutional limitations on independent expenditures by individuals and nonparty associations in election campaigns. The Court addressed and upheld expense ceilings on national and State party committees only in the context of the Fifth Amendment challenge there made. 424 U.S. at 58-59 nn. 66, 67. But as the FEC notes, brief for appellee at 10 n. 5, independent expenditures are not at issue here: "Party committees * * * are deemed incapable of making independent expenditures in connection with the compaigns of their party's candidates." *Cf.* 2 U.S.C. § 441(a)(7)(B)(i) (and expenditure made "in cooperation, consultation, or concert with, or at the request or suggestion of, a candidate, his authorized political committees, or their agents, shall be considered to be a contribution to such candidate.").

Nor do we understand NRSC to suggest in this case that it has made independent expenditures on behalf of candidates, expenditures of the kind the *Buckley* Court found to be constitutionally protected. And surely no frontal attack has been made by NRSC on the constitutionality *vel non* of expenditure limitations imposed on party organs.

as ones of "agency." The State committees do not, in the role of principal, raise and transfer funds to the NRSC as agent; nor do they give any direction as to how "their" funds ought to be spent. Rather, the NRSC raises and spends money as it sees fit; the State committees interact with the NRSC only in the initial agreement to the arrangement. Thereafter the State committees serve as legal shells. We cannot believe that Congress intended the language of Section 441a(d)(3) to authorize artificial relationships of this kind.

We are buttressed in our reliance on the clear language of Section 441a(d)(3) both by the provision's statutory context and by legislative history. The NRSC and its parallel congressional campaign committees were familiar to the Congress that adopted Section 441a(d)(3). Indeed, Congress specifically provided for such committees in Section 441a(h), which permits "the Republican or Democratic Senatorial Campaign Committee, or the national committee of a political party, or any combination of such committees" to make direct contributions of up to $17,500 to senatorial candidates, "notwithstanding any other provision of this Act."[29] If Congress had similarly intended for the NRSC to share in the spending permissions of Section 441a(d)(3), it is not unreasonable to think that Congress would have said so explicitly, or at least signalled its intention in the course of its deliberations.

Yet the legislative history gives no hint that Congress ever foresaw, much less intended, that delegations of

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29. Appellant Democratic Senatorial Campaign Committee argues that the language of § 441a(h) by its own force prohibits any "agency" agreements that lead to NRSC expenditures of more than $17,500 in any single Senate race. *See* brief for appellant at 18-20. In its view, § 441a(h) exhibits clear congressional intent to limit NRSC expenditures to this amount. Because we rest our holding on the plain language of § 441a(d)(3) itself, we need not decide whether § 441a(h) implies a limitation on § 441a(d)(3) or any other provision of the Act.

spending authority under Section 441a(d)(3) might be attempted. On the contrary, during the 1974 legislative debates Senator Brock noted with concern that the Act and its proposed Amendments failed to provide more permissive treatment to the congressional campaign committees.[30] Though he was fully aware of the proposed Section 441a(d)(3) permission for expenditures by the national and State committees—and in fact mentioned it during his remarks—Senator Brock proposed a further amendment that would have exempted congressional campaign committees like the NRSC from the Act's expenditure limits. "I offer this amendment," he said, "because I do not believe that as the bill is written [the congressional campaign committees] could literally operate in support of our candidates under the existing language."[31]

The Senate initially adopted the amendment offered by Senator Brock, but reversed itself five days later.[32] The record of the Senate debate leading to repeal of the Brock amendment is equally revealing. With the attention of the Senate again riveted on the status of the congressional campaign committees under the Federal Election Campaign Act, not a single Senator ever suggested that the NRSC or any similar committee might be able to assume the spending authority of the State committees. Moreover, the 1974 debates evidence a congressional distinction between the political parties, whose role in the political process Congress sought to strengthen, and the campaign committees of the House and Senate. Senator Clark, who led the fight to repeal the Brock amendment, spoke to this point explicitly. "No one," he said, "should confuse national political parties, supported as they are by thousands

30. 120 Cong. Rec. S5189-S5191 (daily ed. Apr. 3, 1974).

31. *Id.* at S5189.

32. *Id.* at S5411-S5415 (daily ed. Apr. 8, 1974).

of people giving in $5 and $10 amounts, with the Senate and House Campaign Committees."[33]

Thus, no more in the legislative history than in the language of Section 441a(d)(3) do we find support for the kind of transfer of statutory authority at issue in this case.[34]

IV. RELEVANCE OF THE TRANSFER PROVISION

The FEC argues that since Section 441a(a)(4) permits the NRSC to transfer unlimited funds to the State committees, it would be "placing form over substance" to forbid the State committees to designate NRSC as their agent. Brief for appellee at 17. We do not address the question whether NRSC may freely transfer funds to State committees under Section 441a(a)(4), because that issue was not joined before this court. While not conceding

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33. *Id.* at S5411.

34. Appellee purports to find evidence of congressional support for its construction of § 441a(d)(3) in the failure of Congress to enact legislation that would have prohibited explicitly any "movement of funds" between State political committees and congressional campaign committees such as the NRSC. *See* brief for appellee at 14-15. The evidence is entirely unpersuasive. First, post-enactment legislative history has very limited utility in statutory construction, *see SEC v. Sloan*, 436 U.S. 103, 120-122 (1978), and in no case could it change the intent of the Congress that passed the statute. *See Regional Rail Reorganization Cases*, 419 U.S. 102, 152 (1974). Second, the House never actually rejected the bill on which appellee relies, but instead refused to consider the measure on its merits. *See* 124 Cong. Rec. H2261-H2269 (daily ed. Mar. 21, 1978). Third, even within the bill the transfer provision was relatively minor; it is at best unclear that the vote to deny legislative consideration on the merits was motivated by opposition to any particular section. Fourth, the House debate and vote occurred before any FEC decision upholding the legality of agency agreements between State committees and the NRSC under § 441a(d)(3). Fifth, and most important, the proposed ban on the transfer of funds, even had it been adopted, would not speak directly to the issue in this case. Our question involves the legality of an arrangement by which a State committee purports to assign its statutory spending rights to the NRSC, not the legality of a fund transfer.

the validity of such transfers,[35] DSCC does not now challenge transfers of funds from NRSC to the State committees, apparently because no such transfers have ever been made.

We are not convinced, however, that an outright transfer of funds from NRSC to a State committee would be equivalent to an "agency" relationship in which the agent, NRSC, controls the funds from start to finish—from raising to spending. In the latter situation the State committee may have no voice in the way funds are spent. Nor is this a difference that is obviously without consequence. When the NRSC pays the piper, it will call the tune. The candidate may have little incentive to communicate with the State committee, preferring to deal with a committee of his colleagues that directs the flow of funds.

If funds were actually transferred to the State committees, on the other hand, the committees would be more likely to maintain an active role throughout the campaign. Even if NRSC attempted to direct how transferred funds were to be spent, the State committees would actually make the day-to-day campaign expenditures and might be able to persuade NRSC that funds should be spent differently than the congressional committee envisioned. As State committees assumed responsibility for campaign disbursements, moreover, candidates might confer more closely with those committees and remain more closely in touch with their local party constituents. Since the struc-

35. We have some doubt about whether § 441a(a)(4) encompasses the congressional committees at all. In order to fall within that section the congressional committees would have to be either "national * * * committees * * * of [a] political party" or subordinate to such a committee. Section 431(14) defines "national committee" in a manner that the parties agree excludes congressional committees. We do not know whether the congressional committees could establish that they are subordinate to the national committees of their parties.

ture of the Act suggests that Congress intended to increase the role of State and national committees, not of congressional committees, we find these possible differences to be potentially meaningful.[36]

It would be inappropriate for this court to speculate further about the ways in which transfers of funds might differ from agency agreements. The parties have not argued the validity of funds transfers, but only of agency agreements. Since we find that the plain language of Section 441a(d)(3) precludes the latter,[37] we must reverse the District Court, declare the Commission's failure to act contrary to law, and direct the Commission to conform with this decision forthwith. *See* 2 U.S.C. § 437g(a)(8)(C).

So ordered.

WILKEY, *Circuit Judge*, dissenting: Like Chief Judge Wright and Judge Ginsburg, I too have read the statute

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36. The dissent argues that the same number of dollars will be raised by the NRSC and spent in the same State senatorial campaign, regardless of whether the NRSC is permitted to act as the agent of the State committees, dissenting op. at 9, and that this factor is all that matters in terms of "substance." The dissent thus fails to consider the possible importance of State committee *control* of finances in strengthening the influence of the State committees and encouraging candidates to communicate more closely with their State party constituencies. Nor is the dissent even consistent in its claim that the court's decision exalts form over substance. Having argued at length that our opinion will not alter the "substance" of campaign finance, the dissent then proceeds to claim that the result will be more sweeping than even the plaintiffs had "bargained for." *Id.* at 8. The court, the dissent argues, should not upset a method of campaign financing that the NRSC has found to have "some functional advantage." *Id.* at 9. Yet the location of such a "functional advantage" in a senatorial campaign committee, rather than in the national or State committees, is a result that Congress showed no desire to achieve.

37. Like the Commission, the dissent fails to come to grips with the only real issue in this case: may party organizations effectively rewrite § 441a(d)(3) of the Act to displace State committees and substitute congressional campaign committees in their stead? For the reasons stated in our opinion, the clear answer to this question is "no."

and base my opinion as to the necessary result in this case on its plain language. Unlike my colleagues, however, I do not approach the task of this court as if we are the first called upon to construe this statute; the issue before us is not our construction of the statute *de novo*, but whether the Commission's interpretation of the statute can be supported on a rational basis so that its conclusion cannot be said to be "contrary to law."[1] Also unlike my colleagues, I reach a result supported by the General Counsel of the Federal Election Commission, the unanimous 6 to 0 vote of the Members of the Commission, and the decision of the District Judge below.[2]

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1. 2 U.S.C. § 437g(a)(8)(C) (1976) and subsequent amendments.

The statutory standard for judicial review requires the court to overturn a Commission interpretation of its implementing statute which is "contrary to law." *Id.* § 437g(a)(8)(C). The Federal Election Campaign Act delegates to the Commission especially broad discretion to set election law policy and to draw the meaningful distinctions appropriate to definitions under the election law. *E.g.*, 2 U.S.C. § 437c(b)(1), *as amended by* Pub. L. No. 96-187, § 306(b)(1), 93 Stat. 1335 (1979): "The Commission shall administer, seek to obtain compliance with, and *formulate policy* with respect to, this Act," (emphasis added); 2 U.S.C. § 431(14)—(15): "The[se] term[s] . . . mean[] . . ., *as determined by the Commission*" (emphasis added).

2. *Democratic Senatorial Campaign Committee v. FEC*, No. 80-1903 (D.D.C. 28 Aug. 1980).

The penchant of this court to give no deference whatsoever to the responsible agency's interpretation of its role and basic statute has been noted with acerbity by the Supreme Court in *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519 (1978) and by commentators, *e.g.*, Scalia, *"Vermont Yankee": The APA, the D.C. Circuit, and the Supreme Court,"* 1978 S. CT. REV. 345, 358, 371. Deference to the Commission on new issues like this before a new agency gives the agency the chance it needs to make its own interpretation, because it has the responsibility to make its statute work. *Power Reactor v. Electricians*, 367 U.S. 396, 408 (1961). Deference to the Commission's view on election law policy and what constitutes compliance seems particularly advised in that events occur very quickly in an election year. The Commission is the expert body charged by Congress with the coherent administration of elections and must, therefore,

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I. STRAIGHT STATUTORY CONSTRUCTION

We start with 2 U.S.C., Ch. 14—Federal Election Campaigns,[3] § 441a, *Limitations on Contributions and Expenditures.* There are *two* subsections—not just one—relevant and decisive in this case.

a. *Dollar limits on contributions.*

. . .

(4) The limitations on contributions contained in paragraphs (1) and (2) do not apply to transfers between and among political committees which are national, State, district, or local committees (including any subordinate committee thereof) of the same political party.

. . .

(d) *Expenditures by national committee, State committee, or subordinate committee of State committee in connection with general election campaign of candidates for Federal office.*

. . .

Footnote continued—

be competent to reach expeditious and equitable judgments drawing reason out of a melange of vaguely consistent election laws obviously adopted by the process of political compromise on this highly charged political field; it is the Commission which is prepared to read the body of election law as a whole. Moreover, the Commission is self-consciously bipartisan. Congress created a Commission, 2 U.S.C. § 437c (1976), which could make sensitive political decisions cognizant of bipartisan exigencies. Courts should tread lightly on these matters of party politics.

3. The Federal Election Campaign Act of 1971 (FECA), Pub. L. No. 92-225, 86 Stat. 3, was amended by the Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263, by the Federal Election Campaign Act Amendments of 1976, Pub. L. No. 94-283, 90 Stat. 475, by the Social Security Amendments of 1977, Title V, Sec. 502, Pub. L. No. 95-216, 91 Stat. 1655, and by the Federal Election Campaign Act Amendments of 1979, Pub. L. No. 96-187, 93 Stat. 1339.

(3) The national committee of a political party, or a State committee of a political party, including any subordinate committee of a State Committee, may not make any expenditure in connection with the general election campaign of a candidate for Federal office in a State who is affiliated with such party which exceeds—

(A) in the case of a candidate for election to the office of Senator, or of Representative from a State which is entitled to only one Representative, the greater of—

(i) 2 cents multiplied by the voting age population of the State (as certified under subsection (e) of this section); or

(ii) $20,000; and

(B) in the case of a candidate for election to the office of Representative, Delegate, or Resident Commissioner of any other State, $10,000.

The latter of the two above provisions, (d)(3), fulfills one of the two prime objectives of the Federal Election Campaign Act—to place a limit on overall expenditures in campaigns for federal office. For my colleagues this provision is sufficient unto itself to settle the question before us in this case. For me it is not sufficient, because this section alone does not purport to tell us where the money, whose total amount is limited, is coming from.[4] To find out that we must look back at the first part of § 441a, *Lim-*

4. The majority, maj. op. at 12-16, appears to be singularly concerned with *who* may spend money under FECA rather than from *where* campaign money may lawfully flow. The transfer provision, 2 U.S.C. § 441a(a)(4), indicates strong legislative intent that campaign monies flow freely through a political party's extended network. Plainly, Congress thought to permit the discretionary assignment of funds among a party's component organizations.

itations on Contributions and Expenditures, to the very first subsection: (a) *Dollar limits on contributions.* Subsections (1), (2), and (3) deal with limits on contributions by persons, multi-candidate political committees, and individuals, provisions which are directed to the second principal objective of the FECA, *i.e.,* eliminating undue and corrupting political influence on candidates and officeholders by limiting contributions. The subsections dealing with persons, multi-candidate political committees, and individuals are not relevant to this case, but subsection (a)(4), quoted above, certainly is.

Subsection (a)(4), far from placing any limitation, specifically provides that the prior limitations in (1) and (2) (persons and multi-candidate political committees) "do not apply to transfers between and among political committees which are national, State, district, or local committees (including any subordinate committee thereof) of the same political party." As will be discussed more fully under IV below, while there are evils associated with large contributions by persons and multi-candidate political committees to candidates for federal office, there are no visible evils associated with the transfer of funds among committees of the same political parties. The contribution limitations as to the original sources have already been applied, and the connection between the recipient federal candidate and the original source of the funds is totally broken and obscured.[5]

So, looking again at subsection (d)(3), we might expect that the national committee of each political party, or a state committee of a political party, would gain a substantial amount of contributions from persons generally,

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5. *See* notes 7-18, 25 *infra* & accompanying text. *See also Common Cause v. Schmitt,* Nos. 80-1609 & 80-1754 (D.D.C. 30 Sept. 1980) (three-judge court) at 18 & n. 40.

and would employ those funds most efficiently to assist the candidates for Senator or Representative in each State as its judgment indicated—but within the overall limit on expenditures as provided by subsection (d)(3). However, in addition to the contributions of persons or other authorized entities, which are limited by §§ 441a(a)(1), (2), and (3), these party national and state committees have an additional source of funds, and that is a transfer of funds from one of the "political committees which are national, State, district, or local committees . . . of the same political party" under subsection (a)(4). These transfers are plainly unlimited in amount, because the funds have been accumulated in obedience to the contribution limits of § 441a(a) and there is no visible evil in the transfer of funds among political committees of the same party, if both the individual contribution limits and the overall expenditure limits on any campaign race are observed.

The Senatorial Campaign Committee and the Congressional Campaign Committees of each major political party have proved to be highly successful fund-raisers. The plaintiff Democratic Senatorial Campaign Committee does not challenge in this suit that under § 441a(a)(4) either a Senatorial Campaign Committee or a Congressional Campaign Committee of either party *can transfer* an unlimited amount of money to either that party's national committee or that party's state committee in one of the individual states, and that the money so transferred can be expended on behalf of that party's candidate for either the Senate or the House in a given state—all within the expenditure limit of (d)(3).

However, for reasons which are not obvious in the record and which are immaterial, the Senatorial and Congressional Campaign Committees of *both* political parties have found it administratively advantageous to make the

above-described transfer of funds in an indirect way.[6] Instead of the Senatorial or Congressional Campaign Committee writing its check to the order of the national committee of its party, the Senatorial or Congressional Campaign Committee of both parties has followed the practice of having the national committee *authorize* the Senatorial or Congressional Campaign Committee of its party to make expenditures *as its agent* on behalf of designated candidates for the Senate and the House. Again, such expenditures by a given national committee from all sources must be within the overall limits of subsection (d)(3).

Significantly, and interestingly, this indirect device of appointing the Senatorial or Congressional Campaign Committee as the agent of the *national* committee, a practice followed by both political parties, is *not* challenged by the plaintiff Democratic Senatorial Campaign Committee here. What is challenged is the exact parallel in direct transfer of funds by the authorization of a *state* committee to the Senatorial (or Congressional) Campaign Committee to expend funds on behalf of a designated candidate for the Senate or House of that political party.[7] This delegation of expenditure authority is practiced *only* by the *Republican* Senatorial and Congressional Campaign Committees, but *not* by the *Democratic*. Why this is so we do not know, and it is immaterial to any court decision, because the delegation of authority from the state committee to the Senatorial or Congressional Campaign Committees rests on precisely the same rationale and statutory provisions permitting unlimited transfers as does the delegation of authority from the national committee to the Senatorial or Congressional Campaign Committees, a practice engaged in by *both* political parties.

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6. Counsel for appellant, Democratic Senatorial Campaign Committee, has informed the court that it too is the designated agent of its party's national committee.

7. *Cf.* Maj. op. at 17-19.

II. FORM OVER SUBSTANCE

My colleagues say that we are not called upon here to pass upon a transfer case, that there is actually no writing of a check by the National Republican Senatorial Committee to a state committee on behalf of a Senatorial candidate in that state. This is true. The transfer of funds and the transfer of their political effect do not take place in that way; it is done indirectly as described above by the delegation of authority from the state committee to the Senatorial Committee (or from the national committee, unchallenged here).

The difference is purely one of form, not substance. It makes absolutely no difference in the scheme of control of campaign expenditures and contributions whether the National Republican Senatorial Committee in Washington writes a check and mails it to the state committee in Louisville, Kentucky, to be expended for the benefit of the Republican nominee for the Senate in the State of Kentucky, or, on the other hand, as is now the practice, the state committee in Louisville, Kentucky, writes a letter to the Senatorial Campaign Committee in Washington authorizing that committee to make expenditures on behalf of the same Republican nominee for the Senate in Kentucky. In either event, the funds expended come from the contributions accumulated by the Senatorial Committee in Washington, those contributions having been duly made in accordance with the limitations of § 441a(a), and expended within the overall limitations of § 441a(d)(3).

It is precisely because to accede to the view argued for by the plaintiff here and espoused by my colleagues would do nothing but exalt form over substance that the Federal Election Commission very sensibly responded in a requested opinion that such delegation of authorized expenditures to the Senatorial or Congressional Campaign Com-

mittee of the same party was lawful within the meaning and purpose of the statute. The FEC stated: "Since funds may be transferred between the congressional campaign and the national committee of the same political party without limitation, it is immaterial as to which committee's funds are being expended under 2 U.S.C. § 441a(d)(3)."[8] There is simply no sense in prohibiting the letter of authorization being written in Louisville and mailed to Washington, when it is recognized that the statute plainly permits under § 441a(a)(4) a check to be written in Washington and mailed to Louisville to accomplish precisely the same purpose, *i.e.*, spending money accumulated by the National Republican Senatorial Committee on behalf of the Republican candidate for Senator in the State of Kentucky.[9]

According to the majority's view, two things will happen: First, the letters of authorization from the state committees to the National Republican Senatorial Committee will become of no effect and the Senatorial Committee in Washington will immediately start writing checks to each state committee for the amount which it has decided to allocate in support of the Republican Senatorial candidates in those states. Secondly—and this is more than the plaintiffs have asked or bargained for—*both the National Committees of the Republican and Democratic parties* will immediately be required to stop writing letters of authorization to their respective Senatorial and Congressional Campaign Committees in Washington; instead,

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8. Advisory Opinion, AO 1976-108, *reprinted in* Commission Appendix at 3a, *reprinted in* [1980] Fed. Elec. Camp. Fin. Guide (CCH) ¶5236.

9. There is no question in this case of limitations on *contributions* under 2 U.S.C. § 441a(h) ($17,500 contribution limit imposed on national and Senatorial Campaign Committees). This case involves only the spending of money in campaigns and applicable *expenditure* limits.

the National Committees of both parties will simply have to arrange the direct transfer of funds from their respective Senatorial and Congressional Campaign Committees, as authorized by § 441a(a)(4), and then the National Committees (instead of the Senatorial or Congressional Campaign Committees) will expend those funds within the limits of subsection (d)(3) on behalf of selected candidates for the Senate and House in the states.

The net result of plaintiff Democratic Committee's position prevailing is that not one dollar less will be spent, not one dollar will be changed from where the members of the national committee, or state committee in consultation with the Senatorial or Congressional Campaign Committees of their respective parties, want the dollar to be expended. All that will happen is that the money will be transferred and administered in a manner which *neither* major political party has found most efficient, but which the Federal Election Commission has held is the exact practical equivalent of the practice of authorized delegation now being followed by both political parties.

An obvious question arises: If the respective committees can transfer and spend the money in precise technical compliance with both relevant subsections of the statute, why do not the committees use this form and achieve the same substance? The record is bare of any explanation of why the various committees have followed the current practice, which dates at least from 1976. Both major parties use the method of their respective National Committees authorizing the Senatorial and Congressional Campaign Committees as agents to make expenditures for candidates within the statutory limits. Only the Republicans have seen fit to have their state committees so work with the National Campaign Committees. There may be advantages of economy of scale in expenditures from one

source, of available expertise in creating and placing advertisements, in obtaining media exposure, in obtaining credit during the campaign, etc.; the court can only speculate. All we know is that both parties employ the indirect method of expenditure by authorizing the committees in Washington as agents, that it must have some functional advantage, and that the Democratic Senatorial Campaign Committee (which does not act as an agent for Democratic *state* committees) has taken the trouble to challenge the National Republican Senatorial Committee's actions as agent for Republican state committees.

III. ESTABLISHED PRECEDENT— ACTION AND OPINION

While the advantage of what the intervenor Republican Committee is doing is not obvious from the record, the profound—and grossly unfair—disadvantage of the court sustaining this Democratic Committee challenge at this late hour is undeniably clear. The actions challenged were in accord with the precedent established over the lifetime of the practice of delegation by both the national and state committees, which rest on the same rationale.

(1) In 1976 the Republican National Committee (RNC) designated the National Republican Senatorial Committee (NRSC) as its agent to make the expenditures for congressional campaigns permitted under subsection (a) (4) and (d) (3).[10] The Democratic National Committee filed a complaint challenging this indirect method, but withdrew it.[11]

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10. *See* Brief for Appellee at 3; Appellant's Brief at 20 n.16; Brief in Behalf of Intervenor, Republican National Senatorial Committee at 3-4.

11. *See* Brief in Behalf of Intervenor, Republican National Senatorial Committee at 4.

(2) Representative Cleveland requested an advisory opinion on the practice, which was specifically approved in Advisory Opinion 1976-108, cited above.[12]

(3) At this time the FEC was engaged in rulemaking, and produced § 110.7 *Party Committee Expenditure Limitations* (2 U.S.C. § 441a(d)). Regulation § 110.7(a)(4) specifically approves the *national* committee of a party making any authorized expenditure under § 441a(d) "through any designated agent" in connection with a presidential campaign. No reference was made to a *state* committee acting through an agent, although both national and state committees are authorized to make expenditures by § 441a(d); the explanation offered is that at that time in 1976 no state committee had made any agency designation in either a presidential or a congressional campaign. Furthermore, it was only in 1978, after the regulation was promulgated, that agency designations were made by state committees to the Congressional Committees in campaigns for House and Senate races.[13]

(4) In 1978 several Republican state committees followed the practice begun in 1976 by the RNC and designated the intervenor National Republican Senatorial (or Congressional) Committee as an agent to make expenditures for the benefit of congressional candidates. This was challenged in two complaints. In MUR 780[14] the FEC concluded on 19 January 1979 that the NRSC had not violated 2 U.S.C. § 441a(d) by making § 441a(d) expenditures as agent of *both* the Montana Republican *State* Committee

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12. *Reprinted in* Brief for Appellee, Commission Appendix at 3a; [1980] Fed. Elec. Camp. Fin. Guide (CCH) ¶5236.

13. *See* Brief in Behalf of Intervenor, Republican National Senatorial Committee at 4.

14. *See* Commission files, Matter Under Review, MUR 780 (19 Jan. 1979).

and the Republican *National* Committee. Likewise, in MUR 820 the FEC concluded on 19 June 1979 that there was no violation of § 441a(d) by the NRSC acting as agent of both the RNC and the Alabama Republican Party.[15] The plaintiff here, the Democratic Senatorial Campaign Committee, did not protest or attempt to overturn these FEC rulings until May 1980 with the filing of this complaint before the FEC.

Surely this was amply reassuring precedent for the intervenor NRSC to continue in this campaign year the practice of acting as agent of the RNC and state committees to make expenditures under §§ 441a(a)(4) and (d)(3), a practice which had been validated and sustained by the FEC against every challenge since 1976. In reliance thereon the intervenor NRSC has entered into contracts for campaign activities, with the media and political suppliers, and with employees to serve during the campaign. These are substantial commitments of millions of dollars, which this court now throws into jeopardy and confusion 30 days before the campaign is to end, in spite of four years of precedential rulings contra by the responsible agency, the FEC, confirmed in this specific case by the FEC General Counsel's opinion, the unanimous 6 to 0 vote of the FEC members, and the decision of the District Court.

One minor point perhaps should be noted at this time. While counsel for the Democratic Senatorial Campaign Committee responded in answer to a direct question from the court at oral argument that the plaintiff was "not challenging transfers in this case," yet it has been suggested that neither the Democratic Senatorial Campaign Committee nor the National Republican Senatorial Committee (nor their respective Congressional Campaign Com-

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15. *See* Commission files, MUR 820 (19 June 1979).

mittees) are "national" committees within the meaning of § 441a(a)(4) authorizing unlimited "transfers between and among committees which are national, State, district, or local committees (including any subordinate committee thereof) of the same political party." We can assume for the disposition of this case, since no party challenges it, that the Senatorial Campaign Committees are within the scope of the "transfer" provision.[16]

IV. TWO PRINCIPAL PURPOSES OF THE FEDERAL ELECTION CAMPAIGN LAWS

It is undisputed that two of the principal objectives of reform in the conduct of federal elections were, first, putting some kind of an overall limit on the horrendously escalating cost of political campaigns, and, secondly, eliminating the pernicious influence of the large campaign contributor over the political candidate or political officeholder.[17] These two reform objectives were to be accomplished in three ways: first, overall limits on cam-

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16. The broad, inclusive scope of the transfer provision, 2 U.S.C. § 441a(a)(4), the compelling need for Commission discretion, and the congressional contemplation of joint "national committee"/"Senatorial Campaign Committee" activity obvious in 2 U.S.C. § 441a(h), all suggest that any committee of a political party, including a party's Senatorial Campaign Committee, would be free to initiate and receive funds transfers under § 441a(a)(4). The Senatorial and Congressional Campaign Committees are identifiable as, and are in fact, part of either the Republican or Democratic parties. *See* 119 CONG. REC. S5194 (daily ed. 3 Apr. 1974) (remarks of Sen. Baker). Furthermore,

> [t]he conferees also determined that it is appropriate to set a higher limit on contributions from persons to political committees of national political parties in order to allow the political parties to fulfill their unique role in the political process. In this connection, the term "political committee established or maintained by a national political party" includes the Senate and House Campaign Committees.

H. R. REP. No. 94-1057 (Conf. Rep.), 94th Cong. 2d Sess. 58 (1976) (discussion of 2 U.S.C. §§441a(a)(1)(B)-(2)(B)).

17. *See Buckley v. Valeo*, 424 U.S. 1, 25-26 (1976) (per curiam).

paign expenditures in the races for President, the Senate, and the House; secondly, stringent limitations on the individual contributions which could be made by persons and organized entities to individual candidates and special purpose committees;[18] thirdly, a system of full public disclosure of all expenditures and all except the most minor contributions.

When we look at the plain language of the statutory scheme, we see that there are overall limits on the expenditures in campaigns for the Senate and the House under § 441a(d)(3). There is no suggestion whatsoever in the plaintiff's argument or in my colleagues' opinion that the practice challenged here in any way is an attempt to or could evade the overall expenditure limitations of subsection (d)(3). It is perfectly clear that whatever funds of the intervenor NRSC, acting as agent of either the Republican National Committee or a state party committee, are expended on behalf of any given Senatorial candidate, those expenditures must be within the overall limits authorized to the RNC or to the state committee, respectively. This is true whether the Senatorial Committee makes the expenditure itself as a result of being designated as an agent of the state or national committee and authorized thereby to make the expenditure, or whether the Senatorial Committee writes a check to either the national committee or the state committee.

Furthermore, accountability for all funds expended on behalf of a given political candidate by any party political committee is placed in the state's party central committee. Regulation § 110.7,[19] *Party committee expenditure lim-*

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18. Controlling campaign contributions, the Supreme Court held in *Buckley v. Valeo*, legitimately suppressed corruption and venal influence by eliminating the possibility of *quid pro quos*.

19. 11 C.F.R. § 110.7 (1977).

itations (*2 U.S.C. 441a(d)*) specifically provides under subsection (c)(1): "The State central committee shall be responsible for insuring that the expenditures of the entire party organization are within the limitations, including receiving reports from any subordinate committee making expenditures under paragraph (b) of this section, and filing consolidated reports showing all expenditures in the State with the Commission." The "expenditures under paragraph (b) of this section" refers to the expenditures of "the general election campaign of a candidate for federal office in that state who is affiliated with the party," *i.e.*, a designated Republican or Democratic candidate for the Senate or for the House.

The second principal purpose of campaign reform, limiting contributions in order to eliminate the evil effect of huge contributions influencing candidates or officeholders, is taken care of in § 441a(a), *Dollar limits on contributions.*[20] As was briefly discussed above, after placing specific limits on (1) persons, (2) multi-candidate political committees, and (3) individual aggregate contributions, the Congress came to consider the possible and probable "contributions" to be anticipated between political committees of the same political party. These, of course, are not "contributions" in the original sense;[21] they are ac-

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20. *See* notes 17-18 *supra* & accompanying text.

21. Party committees, including Senatorial and Congressional Campaign Committees, it is worth noting, are deemed incapable of making *independent expenditures* which were accorded great protection in *Buckley v. Valeo*, 424 U.S. 1 (1976) and *Common Cause v. Schmitt*, Nos. 80-1609 & 80-1754 (D.D.C. 30 Sept. 1980) (three-judge court). *See* Brief for Appellee at 10 n.5. 2 U.S.C. § 441a(d) is the only statutory authorization for *expenditures* by party political committees. There is no support for an inference that Senatorial and Congressional Campaign Committees were meant by Congress to be excluded from making *any expenditures* at all in connection with campaigns. It makes more sense that these Campaign Committees should share in their parties' overall expenditure limitations.

tually *transfers* of funds which have been received by the respective committees within the contribution limit for individuals and organizations previously set. Hence, the Congress made absolutely clear in § 441a(a)(4) that the limitations on contributions in the above paragraph "do not apply to transfers between and among political committees which are national, State, district, or local committees (including any subordinate committee thereof) of the same political party."

The reason for this Congressional exemption of transfers between political committees of the same party is perfectly obvious: there is no evil to be prevented by barring the free exchange of funds among political committees of the same party. There is no fear of undue influence exerted by a large contributor over the individual candidate or political officeholder, for two reasons: (1) the individual contributions have originally been limited by the contribution limits in the statute; and (2) the political candidate or officeholder does not know who made the contributions to the overall national, state, district, or local committee which generously endows him with funds, or, at least, he does not know who contributed the specific dollars which the individual candidate receives.[22] And, no matter by whom or by whose agency the expenditures are made, the expenditures on any candidate's behalf must be within the limits of § 441a(d)(3). Since there was no evil to be prevented by imposing a restriction on transfers, Congress very wisely specifically said that there were no limits on transfers; and, the Federal Election Commission, charged with implementing and enforcing the campaign laws, has very wisely and sensibly said, from the start and consistently thereafter, that the practice of designating

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22. *See generally Common Cause v. Schmitt*, Nos. 80-1609 & 80-1754 (D.D.C. 30 Sept. 1980) (three-judge court).

another committee as an agent and authorizing expenditures of funds by the agent, when the funds could have been directly transferred anyway, is the equivalent of the transfers specifically authorized by the statute.

Not only is there no evil to be prevented by the limitation which the plaintiff Democratic Committee has persuaded my colleagues to write into the statute, but there are positive benefits to be gained by allowing the free interchange of funds among political committees of the same party, whether by direct transfers or indirectly by authorizing another committee to act as agent in making the expenditures. A party cannot "unduly influence" its own candidate, but by supplying funds for the individual candidate it may instill in the candidate some sense of party loyalty and party responsibility, which is generally recognized to be a beneficial relationship. Certainly to the extent an individual candidate is beholden to his own political party for a substantial portion of his campaign funds, he is much less vulnerable to individual pressure groups who would sway his vote, for good or evil, on certain critical issues.[23]

It should not be overlooked that the funds raised by the committees referred to in subsection (a)(4), whose funds are to be freely transferred, are funds raised from citizens all over the United States. To that extent they are an amalgamation, an expression of support from small contributors. In that respect they are similar to the funds raised through the federal tax process by the check-off on individual income tax returns, which is an expression of national policy preferring funds to be raised as anony-

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23. As a Congressman, Judge Abner Mikva, presently a member of this court, argued for the benefits of free transferability of party funds. 124 CONG. REC. H2263 (daily ed. 21 March 1978).

mously and in as widespread a fashion as possible. To the extent that these funds can be used freely in individual Senate and House campaigns, we are implementing a definite national policy. The position urged by the plaintiff here and adopted by Judges Wright and Ginsburg cuts directly contrary to that salutary policy by eliminating the most effective and efficient method chosen.

V. FIRST AMENDMENT CONSIDERATIONS

It is quite apparent from the lengthy Congressional debates in regard to the federal election laws over a period of years that Congress was quite aware of the fact that, in imposing contribution and expenditure limitations, it was legislating in an area of vital First Amendment concerns. If there was any legislator who was not aware of that, he was surely made aware of it by the Supreme Court's decision in *Buckley v. Valeo*. "The Act's contribution and expenditure limitations operate in an area of the most fundamental First Amendment activities."[24]

There is no need to rehash the extensive Supreme Court analysis on the First Amendment grounds in *Buckley*. It is clear that the Court held that construction of the Act must be made in light of First Amendment rights, and so must this court's construction here. It is sufficient to point out that the Supreme Court sustained limitations on individual contributions only because the perceived evil of undue influence by large contributors on candidates and officeholders was sufficient to justify these restrictions. At the same time, the Supreme Court struck down the limitations on individual expenditures on behalf of his own individual candidacy, because the use of money by an individual is a form of speech protected by the First Amend-

24. 424 U.S. 1, 14 (1976).

ment, and there could be no evil of undue influence by one man exercising his First Amendment rights.

Similarly, in the case at bar, there is no visible evil in any "undue influence" by a political party on its own nominated candidate for the Senate or the House.[25] Hence, there is absolutely no evil to be eliminated by gratuitously imposing a restriction on the free interchange of funds among the political committees of the same political party, so long as those funds are accounted for and the expenditures are controlled by a designated accountable committee within the overall limitations on expenditures for that office. It is illuminating to compare the specific restrictions, which Congress did clearly write into the statute, with the tortuous and convoluted construction which my colleagues find it necessary to engage in to sustain the prohibition against free interchange of funds argued for the plaintiff Democratic Committee.[26] When there is no clear, specific prohibition against the action complained of,

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25. *Cf. Common Cause v. Schmitt*, Nos. 80-1609 & 80-1754 (D.D.C. 30 Sept. 1980) (three-judge court) at Part III. A. 4. (political committees, through expenditures rather than contributions, do not pose *quid pro quo* threat).

26.

> The First Amendment protects political association as well as political expression. The constitutional right of association explicated in *NAACP v. Alabama*, 357 U.S. 449, 460 (1958), stemmed from the Court's recognition that "[e]ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association." Subsequent decisions have made clear that the First and Fourteenth Amendments guarantee "freedom to associate with others for the common advancement of political beliefs and ideas," a freedom that encompasses '"[t]*he right to associate with the political party of one's choice.*"' *Kusper v. Pontikes*, 414 U.S. 51, 56, 67 (1973) quoted in *Cousins v. Wigoda*, 419 U.S. 477, 487 (1975).

Buckley v. Valeo, 424 U.S. 1, 15 (1976) (emphasis added). *See also Common Cause v. Schmitt*, Nos. 80-1609 & 80-1754 (D.D.C. 30 Sept. 1980) (three-judge court) at Part III B.

the difficulty of finding the rationale to restrict free speech should be proof positive that my colleagues are engaged in an unworthy effort.

Mark this well. No person, no group of persons (committee) needs the *permission* of any Congress or any court to spend money to assist candidates for public office. That is free speech. There can be limitations and regulations as to amounts, methods, publicity, and accountability, but the validity of those limitations will be strictly tested. The limitation must be justified by the evil which the limitation is designed to prevent, just as we test any other limitation on free speech. In this, as in any other area of free speech, the limitation must be precisely spelled out and clearly relevant to prevention of evil.[27] Neither

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27. I submit that the majority fails to grasp the significance of what the Supreme Court did in *Buckley v. Valeo*, 424 U.S. 1 (1976), in upholding limits on Contributions, but striking down limits on Expenditures. (*See* maj. op. at n. 27.) *Both* are in the First Amendment area. Where contributions are concerned, the evil of the *quid pro quo* is obvious, so the statutory limits are justified. Expenditures are a different matter, for there is no visible corruption when money amplifies free speech; *hence the Court struck down every limitation on Expenditure challenged on First Amendment grounds.* In so doing the Court spoke in terms relevant to the majority's effort to restrict expenditures here:

> "No governmental interest that has been suggested is sufficient to justify the restriction on the quantity of political expression imposed by § 608(c)'s campaign expenditure limitations.
>
> . . . .
>
> "The interest in alleviating the corrupting influence of large contributions is served by the Act's contribution limitations and disclosure provisions rather than by § 608(c)'s campaign expenditure ceilings." (p. 55)
>
> . . . .
>
> "The interest in equalizing the financial resources of candidates competing for federal office is no more convincing a justification for restricting the scope of federal election campaigns."
>
> . . . .

(Continued on following page)

the plaintiff nor my colleagues have even claimed any evil to be prevented by the restriction they would engraft on the statute. Section 441a(d)(3) is no prohibition on the activities of intervenor National Republican Senatorial Committee, but an overall limit on expenditures for federal

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Footnote continued—

"There is nothing invidious, improper, or unhealthy in permitting such funds to be spent to carry the candidate's message to the electorate.[64]

[64]As an opinion dissenting in part from the decision below noted: "If a senatorial candidate can raise $1 from each voter, what evil is exacerbated by allowing that candidate to use all that money for political communication? I know of none." 171 U.S. App. D.C., at 268, 519 F.2d, at 917 (Tamm, J.)" [in which this writer joined]. (p. 56)

"The First Amendment denies government the power to determine that spending to promote one's political views is wasteful, excessive, or unwise. In the free society ordained by our Constitution, it is not the government, but the people—individually as citizens and candidates *and collectively as associations and political committees*—who must retain control over the quantity and range of debate on public issues in a political campaign.

"For these reasons we hold that § 608(c) is constitutionally invalid." (pp. 57-58)

The Court went on to *validate contribution ceilings*, but "[b]y contrast, *the First Amendment requires the invalidation of the Act's independent expenditure ceiling*, § 608(e)(1), its limitation on a candidate's expenditures from his own personal funds, § 608(a), *and its ceilings on overall campaign expenditures*, § 608(c). These provisions place substantial and direct restrictions on the ability of candidates, citizens, *and associations* to engage in protected political expression, restrictions that the First Amendment cannot tolerate." (Emphasis added.) *Id.* at 58-59.

The specific holding of *Buckley* was, of course, as the majority suggests (maj. op. at n. 27), to invalidate the *independent* expenditure limitations, not to rule on expenditures of a political party committee—a ruling which, if made, would have left one point of view in the case at bar bereft of any support whatsoever. But surely the language used by the Court, the rationale of sustaining restrictions *only* where there was an obvious evil to be prevented, is highly relevant to our probem here. *Buckley* confirms that *all* of FECA's campaign "contribution and expenditure limitations operate in an area of the most fundamental First Amendment activities." 424 U.S. at 14.

elective office and a method of accounting utilizing the respective party national and state committees. The only other relevant provision, § 441a(a)(4), authorizes the intervenor NRSC to do directly what it has done indirectly here. In what the Supreme Court has termed "an area of the most fundamental First Amendment activities," this is a shaky foundation for the decision my colleagues stretch to reach.

APPENDIX B

Opinion of the United States District Court

(Filed August 28, 1980)

Civil Action No. 80-1903

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DEMOCRATIC SENATORIAL
CAMPAIGN COMMITTEE,
Petitioner,

v.

FEDERAL ELECTION COMMISSION,
Respondent.

MEMORANDUM OPINION

This is an action challenging the dismissal by the Federal Election Commission (the Commission) of a complaint alleging violations of the Federal Election Campaign Act of 1971, as amended (2 U.S.C. § 431 *et seq.*), filed by the Democratic Senatorial Campaign Committee against the National Republican Senatorial Committee. Petitioner Democratic Senatorial Campaign Committee (DSCC) seeks a declaration by this Court pursuant to 2 U.S.C. § 437g(a)(8) that the Commission's determination was contrary to law and an order directing the Commission to comply with such declaration within 30 days.

The DSCC is a political committee organized by Democratic Party members specifically to support Democratic candidates in elections for the United States Senate. The

National Republican Senatorial Committee (NRSC) is a political committee organized by Republican Party members specifically to support Republican candidates in elections for the United States Senate.

The administrative complaint involved was filed with the Commission by the DSCC on May 9, 1980, pursuant to 2 U.S.C. § 437g(a)(1). The allegations of the complaint concerned the practice of various state committees of the Republican Party authorizing the NRSC to make expenditures which the state committees were entitled to make in connection with general election campaigns for the United States Senate under 2 U.S.C. § 441a(d). By written agreement, the various state committees had designated the NRSC as their "agent" in 1978 for the purpose of making such expenditures.

The complaint asserted that the NRSC was prohibited by the statute from acting as the agent of the various state Republican Party committees under 2 U.S.C. § 441a (d).

DSCC did not challenge the fact that the NRSC had been designated as the agent of the national committee of the Republican Party in making § 441a(d) expenditures on behalf of Republican senatorial candidates. Rather, it challenged only the ability of the state committees to designate NRSC as their agent in making § 441a(d) expenditures. The matter had been considered and rejected by the Commission in two previous cases; i.e., *Friends of Donald Stewart Committee v. NRSC,* MUR 820, and *National Committee for an Effective Congress v. NRSC,* MUR 780.

Pursuant to 2 U.S.C. § 437g, the Commission, which is vested with exclusive jurisdiction for administration and civil enforcement of the Act, *see* 2 U.S.C. §§ 437c(b)(1), 437d(e), gave the NRSC an opportunity to demonstrate that

no action should be taken against it by the Commission. NRSC submitted a written response to DSCC's complaint.

On July 11, 1980, the Commission adopted the recommendation of its General Counsel and determined by 6-0 vote that there was no reason to believe the NRSC had violated the Act. Accordingly, it dismissed the complaint, closed its file in the matter, and so notified complainant DSCC.

Thereafter, on July 30, 1980, DSCC filed a complaint in this Court seeking to have the Commission's determination declared contrary to law. The following day, July 31, 1980, DSCC filed a motion for summary judgment. On August 18, 1980, FEC filed a cross-motion for summary judgment.

As the following discussion will show, there are no genuine issues as to any material facts in this action, and the Commission's action in dismissing petitioner's administrative complaint was not contrary to law. Accordingly, the Commission's cross-motion for summary judgment is granted, and petitioner's motion for summary judgment is denied.

DSCC's principal complaint is that under the agency arrangement engaged in between NRSC and State, when the State has insufficient funds to come up with its two cents per voting age population of the State, the NRSC makes up the difference up to a maximum of four cents: two cents per voting age population through its agency agreement with the National Committee plus two cents per voting age population pursuant to agency agreement with the State committee (plus the $17,500 allowable contribution to a senatorial candidate).

The FEC relied upon 2 U.S.C. § 441a(a)(4) which provides:

> The limitations on contributions contained in paragraphs (1) and (2) do not apply to transfers between and among political committees which are national, State, district or local committees (including any subordinate committee thereof) of the same political party.

The FEC reasons that this provision authorizes the transfers challenged herein. In the FEC's view, it permits expenditures by the NRSC on behalf of the State committees subject to the express limitation on State committee spending contained in § 441a(d)(3).

In the instant case, the Court finds its scope of review to be a narrow one. It is well settled that courts must accord great deference to the agency below in its administration of the statute with which the agency is charged. *Bell v. Brown*, 181 U.S.App. D.C. 226; 557 F.2d 849 (1977).

Absent a finding that the FEC's determination was arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law, its determination must be affirmed. *Hampton v. Federal Election Commission*, [1980] Fed. Elec. Cap. Fin. Guide (CCH) ¶9036 at 50,439-40 (D.D.C. 1977), *aff'd*, No. 77-1546 (D.D. Cir. July 21, 1978) (unpublished opinion). *In re Federal Election Campaign Act Litigation*, 434 F.Supp. 1044, 1046 (D.D.C. 1979). The Court is unable to so find, and the decision below must remain undisturbed. Accordingly, petitioner's motion for summary judgment is denied, respondent's motion for summary judgment is granted, an appropriate order is entered herewith, and the petition is dismissed.

/s/ JUNE L. GREEN
U.S. District Judge

Judgment Entry of the United States District Court

(Filed August 28, 1980)

Civil Action No. 80-1903

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DEMOCRATIC SENATORIAL CAMPAIGN COMMITTEE,
Petitioner,

v.

FEDERAL ELECTION COMMISSION,
Respondent.

The Court, having fully considered the motion for summary judgment filed by petitioner Democratic Senatorial Campaign Committee and the cross-motion for summary judgment filed by respondent Federal Election Commission, and the Court having heard arguments by both sides, it is by the Court this 28th day of August 1980,

ORDERED that the motion of petitioner Democratic Senatorial Campaign Committee for summary judgment is denied; it is further

ORDERED that the motion of respondent Federal Election Commission for summary judgment is granted in accordance with the Memorandum Opinion filed herein this date; and it is further

ORDERED that this action is dismissed.

/s/ JUNE L. GREEN
U.S. District Judge

APPENDIX C

The Certification of the Vote of the Federal Election Commission

(Dated July 11, 1980)

MUR 1234

BEFORE THE FEDERAL ELECTION COMMISSION

IN THE MATTER OF

NATIONAL REPUBLICAN SENATORIAL COMMITTEE

CERTIFICATION

I, Marjorie W. Emmons, Secretary of the Federal Election Commission, do hereby certify that on July 10, 1980, the Commission decided by a vote of 6-0 to take the following actions regarding MUR 1234:

1. Find NO REASON TO BELIEVE that the National Republican Senatorial Committee violated the Act in making expenditures, under 2 U.S.C. §441a(d)(3), as agent of both the Republican National Committee and of a Republican State Committee.
2. CLOSE THE FILE in this matter.
3. Send the letters of notification as attached to the First General Counsel's Report dated July 8, 1980.

Voting for this determination were Commissioners Aikens, Friedersdorf, Harris, McGarry, Reiche, and Tiernan.

Attest:

/s/ MARJORIE W. EMMONS
Secretary to the Commission

APPENDIX D

The Federal Election Commission's First General Counsel's Report

(Dated May 9, 1980)

FEDERAL ELECTION COMMISSION
1325 K Street, N.W.
Washington, D.C. 20463

FIRST GENERAL COUNSEL'S REPORT

Date and Time of Transmittal by OGC to the Commission 7-8-80

MUR #1234
Date Complaint Received by OGC May 9, 1980
STAFF MEMBER Convery

COMPLAINANT'S NAME: Democratic Senatorial Campaign Committee

RESPONDENT'S NAME: National Republican Senatorial Committee

RELEVANT STATUTE: 2 U.S.C. § 441a(d); 11 C.F.R. § 110.7(a)(4)

INTERNAL REPORTS CHECKED: None

FEDERAL AGENCIES CHECKED: None

SUMMARY OF ALLEGATIONS

In its complaint and in the documents attached thereto (see discussion re: The Filing of the Complaint, below), the Democratic Senatorial Campaign Committee (DSCC) alleged that the National Republican Senatorial Committee (NRSC), violated the Act in connection with several 1978 general elections for the Senate, and is about to violate the Act with regard to 1980 general elections for the Senate, as follows:

2 U.S.C. § 441a(d) provides that the national committee of a political party, or a State committee of a political party, including any subordinate committee of a State committee, may not make any expenditure in connection with the general election campaign of a candidate for Federal office in a State who is affiliated with such party which exceeds —

> (A) in the case of a candidate for election to the Office of Senator . . . the greater of —
>
> > (i) 2 cents multiplied by the voting age population (V.A.P.) of the State (as certified under subsection (e) of this section; or
> >
> > (ii) $20,000.

Complainant has no argument against NRSC, as agent for the Republican National Committee, making expenditures on behalf of Senate candidates;[1] and has no problem with State committees[2] making such expenditures on behalf of Senate candidates in their particular States.

Complainant does object to, and alleges as a violation of § 441a(d), the practice followed by certain Republican State Committees, whereby they delegate NRSC as their "agent" for the purpose of making § 441a(d) expenditures to Senate candidates in those States.

DSCC claims that such action, which in effect gives NRSC the opportunity to spend 4 cents x V.A.P. in each State in which it has been "delegated," is contrary both to the letter and the spirit of § 441a(d).

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1. Complainant concedes that such activity is specifically authorized by 11 C.F.R. § 110.7(a)(4).

2. To include any district, local or subordinate committees thereof.

In tables attached to its complaint, DSCC purports to show that, by using such delegations from State committees, NRSC overspent their § 441a(d) expenditure limitation in 22 of the 36 general election campaigns of Republican candidates for Senate in 1978. Further, DSCC stated that it believes that the "practice employed by NRSC during the 1978 Senatorial campaigns will be repeated this year . . .".

Complainant DSCC requested that the Commission a) determine the merits of its complaint on an expedited basis; b) find probable cause to believe that NRSC has committed, and is about to commit, violations of § 441a of the Act; and *either* c) within 30 days of that finding, seek to obtain agreement from NRSC that it, and all entities acting on its behalf 1) will not make expenditures in excess of limitations imposed on national party committees, and 2) will not transfer funds to State committees for the purpose of making § 441a(d) expenditures pursuant to their authority under the Act; *or* d) in the event that conciliation efforts do not yield, such an agreement within 30 days, immediately institute an action in U.S. District Court seeking the imposition of a temporary and permanent injunction to halt [alleged] violations of § 441a (d), and seeking civil penalties.

Following discussion of a procedural issue raised in the filing of the complaint, we will discuss the arguments raised by DSCC; note responses made by NRSC in its brief dated May 30, 1980; and state our conclusions with regard to each issue.

I. THE FILING OF THE COMPLAINT

On May 9, 1980, this office received a communication from the complainant which included the following: a) cover letter, dated May 9, signed by Robert F. Bauer,

General Counsel to DSCC; b) Complaint and Request for Expedited Consideration, signed by Mr. Bauer; c) the affidavit of Tom Baker, Executive Director and Secretary-Treasurer of DSCC; and, d) Memorandum of Points and Authorities, also signed by Mr. Bauer.

After receiving our letter of notification, with the above-named documents attached, James F. Schoener, counsel to NRSC, notified us of his objection to the adequacy of the complaint. Specifically, he contended that the complaint filed by Mr. Bauer had not been sworn to as required by 2 U.S.C. § 437g(a)(1) and 11 C.F.R. § 111.4(b)(2).

We reviewed the entire package submitted by complainant and found that Mr. Schoener is technically correct in his allegation that the nine page document designated the "Complaint and Request for Expedited Consideration" is not sworn to or notarized.

However, at paragraph 2 of his affidavit, which was sworn to and notarized, Mr. Baker the Executive Director and Secretary-Treasurer of the DSCC stated the following:

> I have read and authorized the filing of the foregoing Complaint and Request for Expedited Consideration. The DSCC files this Complaint to prevent the National Republican Senatorial Committee ("NRSC") from making expenditures in connection with the impending general elections for the Senate that exceed the explicit limitations applicable to national committees of political parties under § 441a(d) of the Federal Election Campaign Act ("Act"). The factual allegations contained in the foregoing Complaint and this affidavit are true and correct to the best of my knowledge and belief.

We advised Mr. Schoener that, in view of the above recitation, this office would consider the DSCC's complaint

as having been properly filed. However, we also indicated that he could raise the objection again in his response to the Commission. He has done so.

In his submission, Mr. Schoener maintains that Tom Baker swore only that he had read and had authorized the filing of *a* complaint, but that there is no showing that the complaint attached to the affidavit is *the* complaint which Mr. Baker had read and authorized.

The requirement that complaints be signed and sworn to was added to the Act by the 1976 Amendments. House debate tends to indicate that the principal reason for the requirement was to eliminate the filing of anonymous complaints.[3] (See 122 Cong. Rec. H2533 (daily ed. March 30, 1976) (remarks of Mr. Hays)).

Further, the Commission's Regulations, at Section 111.4(b)(2) require that the *contents* of the complaint shall be sworn to and signed in the presence of a notary public and shall be notarized. (Emphasis added). We submit that Mr. Baker has done exactly that.

Considering both the complaint and the affidavit in their entireties, we perceive little danger that the complaint Mr. Baker certified he had read was not the same complaint that was filed with the Commission.

Therefore, we recommend that the Commission overrule Mr. Schoener's objection and proceed to a consideration of the merits of this matter.

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3. In order to prevent the filing of false complaints, the 1976 Amendments also added the language "Any person filing . . . a complaint shall be subject to the provisions of section 1001 of Title 18, United States Code."

II. DISCUSSION

By way of background, we note that the Commission has, on two occasions, considered precisely the same issue as is raised here. In both those cases, MUR's 780 and 820, the Commission determined that the NRSC's making § 441a(d) expenditures as agent of both RNC and a State Committee did not violate the Act, even though the expenditures were in excess of what NRSC could have made had it been delegated only by RNC.

In MUR 780, we based our recommendation of no RTB on two factors: 1) there is no specific statutory or regulatory prohibition against a State Committee designating NRSC as its § 441a(d) agent (this argument was subject to some discussion at the Commission table, and, in retrospect, it probably is the weaker of the two); and 2) the Act allows for unlimited transfers of money between and among political committees of the same party. In this regard, the Commission had earlier issued an Advisory Opinion dealing with the question of whether a § 441a(d) agency arrangement requires the agent to expend funds owned by the principal, or whether the agent may be authorized to expend funds owned by the agent. The Commission determined that, if both principal and agent were committees of the same national party, funds could be transferred between them without limitation. Therefore, it was immaterial as to which committee's funds were being expended under 2 U.S.C. § 441a (d)(3).

In MUR 820, it was stated that:

> Although FEC's regulations refer only to . . . an agency agreement between a national committee of a political party and any designated agent, the stated purpose of the regulation was to allow "the national committee

and the state and subordinate State committees of a political party to make coordinated expenditures in the general election . . ." *See Explanation and Justification of Regulations* at 16 (July 1978). It would seem that the goal of coordinated party expenditures could be achieved by allowing the State Party to designate a national committee of the Party as its agent as well as by allowing the National Party to designate a State committee as its agent.

In addition, the fact that FECA permits unlimited transfers between national and State political committees would indicate that such an agency agreement would be permissible between the State committees and the National Committee. *See* 2 U.S.C. § 441 (a)(4). In other words, if 11 C.F.R. § 110.7(a)(4) is read to allow such agency agreements for national committees but not for State committees, the Republican National Committee could merely transfer the maximum in allowable § 441a(d) expenditures . . . to the State Committee. Such a requirement would seem to place form over substance since the national and state party committees could be presumed to be working toward the same goal and probably even coordinating campaign strategy in connection with the Senatorial campaigns.

See First General Counsel's Report at 3

The complainant in the instant matter would have the Commission reverse its determination in MUR 780 (complaint, page 7); find that delegations of § 441a(d) authority by State committees to NRSC are illegal; and seek to enjoin NRSC from acting as the § 441a(d) agent for any State Committee.

III. POINTS MADE BY COMPLAINANT, AND DISCUSSION THEREOF

A. THE DELEGATION OF STATE PARTY COMMITTEE § 441a(d) LIMITS TO THE NRSC IS NOT CONSISTENT WITH THE ACT.

The complainant states that Section 441a(d)(3), by its very terms, confers a "special spending authority" in general election campaigns for Senate on two specific committees: 1) the national committee of a political party and 2) the state committee of a political party. They argue that since § 441a(d) represents a "carefully defined exception" to the contribution limits that would otherwise be applicable to these committees, the provision must be read restrictively.

Accordingly, DSCC concludes that, unless the Act provides "specific authority for," or its "policies otherwise justify," the delegation of a State Committee's limitation to a third party or an "agent" for § 441a(d) purposes, such a delegation must be rejected as unlawful.

We are not convinced that an argument as to the "delegability" of § 441a(d) expenditure authority may properly be fashioned from the terms of that statute. However, if such an argument may be made, we would not read § 441a(d)(3) as narrowly as DSCC would have us.

Their argument treats § 441a(d)(3) as if it exists independently; it ignores the prefatory language contained in § 441a(d)(1), as follows:

> *Notwithstanding any other provision of law with respect to limitations on expenditures or limitations on contributions,* the national committee of a political party and a State committee of a political party, in-

> cluding any subordinate committee of a State committee, may make expenditures in connection with the general election campaign of candidates for Federal office, subject to the limitations contained in paragraphs (2) and (3) of this subsection.

(Emphasis added). This language would suggest that § 441a(d) is not a "narrowly drawn exception" as complainant would have us believe, but is a broad grant of authority to national committees and State committees to make expenditures in amounts in excess of those allowed to any other entity, subject only to the limitations specifically established in 2 U.S.C. §§ 441a(d)(2) and (3).

This interpretation is consistent with the early legislative history of the provision which ultimately was to emerge as § 441a(d). (In order to appreciate the early history of this provision, it must be remembered that the 1974 Amendments, as first written, contemplated public financing of all campaigns for Federal office. See, e.g., S.3044, 93d. Cong., 2d Session). Political parties were envisioned as the source, and the only source, for additional "private" financing, and as a "legitimate pooling mechanism"[4] for "substantial private funding."[5] Nowhere in this legislative history is there any suggestion that the national committee of a political party and the State committee of the same party were to function as *separate* "pooling mechanisms."

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4. See Senate Report 93-689 to accompany S.3044 at 3.

5. Id. at 7.

B. SECTION 441a(d) SPENDING AUTHORITY FOR STATE PARTY COMMITTEES WAS INTENDED TO BOLSTER THE ROLE OF STATE COMMITTEES UNDER THE NEW CAMPAIGN REFORMS, BUT THE NRSC's USE OF "DELEGATED" STATE COMMITTEE § 441a(d) AUTHORITY CONTRAVENES THOSE PURPOSES.

The complainant argues that the legislative history of § 441a(d) "establishes . . . that the provision is designed to bolster and enhance the role of political parties at *both* national *and* state levels." (Emphasis is complainant's) In support of this argument, they assert that Senate Report 93-689 constitutes the "best available authority on the purposes of this provision." Memorandum of Points and Authorities at 3.

DSCC then proceeds to cite a single passage from the Senate Report:

> Under the Committee bill parties would retain their essential non-financial responsibilities in electoral politics. More important, the bill retains the role of political parties in private financing for a Federal candidate.

We do not agree that this passage in any way supports the argument set out above. It speaks only of "parties" and "political parties;" it does not mention, and draws absolutely no distinction between, "national parties" and "State parties."

Next, the complainant quotes a passage from remarks made by Senator Kennedy during floor debate:

> "By conferring independent spending authority on party committees at the national *and* state level, over and above the candidate's own spending limits, the

> bill establishes *a specific rule for the parties in their own right, free of the candidates control." Congressional Record,* March 26, 1974, p.8210, (Emphasis added by complainant)

Whatever value this passage might have had in supporting DSCC's argument is, we believe, negated by the fact that is quoted out of context. A review of the Congressional Record demonstrates that Senator Kennedy was specifically addressing his remarks to the role of political parties under public financing and was attempting to demonstrate that that form of financing would "not diminish the role of political parties in the Nation." See Cong. Rec., daily ed. March 26, 1974 at S. 4465 (remarks of Senator Kennedy).

Finally, complainant cites a portion of an "Outline of S. 3044" as supplied by Senator Kennedy and printed in the Congressional Record:

> *"In order to assure the continuity of normal functions of political parties, to provide an independent role for the parties in general elections, and to offer an additional opportunity for private contributions,* the national committee of a political party is entitled to spend a total of 2 cents per voter *of its own funds,* collected from private contributions, on behalf of candidates for Federal office in general elections; *and* a State committee of a political party is entitled to spend a total of 2 cents per voter *of its own funds on behalf of such candidates within the States. Congressional Record,* March 26, 1974, p. 8213 (emphasis added by complainant).

Once again, a review of the context within which this passage appeared indicates that the reference to a state committee using "its own funds" was to distinguish those funds ("private funds") from "public funds" and not to

distinguish them from funds raised by another party committee, most particularly, the national party committee.

In concluding the discussion of this section, we comment that it appears that complainant is attempting to draw an artificial distinction between the national committee of a party and the State committee of the same party. By way of 2 U.S.C. § 441a(a)(4), which was added to the Act as part of the 1976 Amendments, Congress rejected such a distinction. This provision allows for unlimited transfer of funds between political committees of the same party. As was stated by respondent in its submission "Congress [thus] left it to each party and its committees to decide on how to best support party candidates within specified dollar limitations and minimal restrictions."

IV. COMPLAINANT WOULD HAVE THE COMMISSION ACCOMPLISH THROUGH THE ENFORCEMENT PROCESS WHAT CONGRESS HAS DECLINED TO ACCOMPLISH THROUGH LEGISLATION

As was discussed above, the Commission has, on two prior occasions, agreed that NRSC may make § 441a(d) expenditures as agent of both RNC and a particular State committee. Complainant would have the Commission cut back on NRSC's authority to make such expenditures and would have the Commission abolish NRSC's authority under § 441a(a)(4) to make unlimited inter-committee transfers.

H.R. 11315, reported out of the Committee on House Administration on March 16, 1978, would have had the same effect.

Section 113 of that bill would have continued to permit political committees of the same political party to make unlimited transfers between and among each other *except*

that "no movement of funds" would have been permitted "between the political committees of a national political party (including the House and Senate congressional campaign committees of such party) and the political committees of a State political party (including district, local, or subordinate committees of such party) for the purpose of making contributions to, or expenditures on behalf of any candidate for Federal office."

That same section of H.R. 11315 also would have reduced the § 441a(d) expenditures which a national committee of a political party or the state committee of a political party could make in connection with the general election campaign of a candidate for Senate. Under H.R. 11315, the permissible level of § 441a(d) expenditures would have been 1 cent x V.A.P. or $20,000, whichever was greater (as compared with the already existing 2 cents x V.A.P. or $20,000, whichever was greater).

Amid considerable controversy, the House Rules Committee sought a rule by which H.R. 11315 would be considered by the Committee of the Whole House on the State of the Union. The Congressional Record for March 21, 1978, is replete with comments attacking that Rule, and attacking H.R. 11315, as follows:

> . . . why reduce the ability of the political parties to support its candidates? How can the Republican Party unduly influence a Republican candidate? How can the Democratic party unduly influence a Democratic candidate? On what basis should the ability of the two political parties to support their candidates be prevented? And what is improper about a national party committee transferring funds to a State committee for use in Federal campaigns. This bill will prevent that, too.

124 Cong. Rec. H. 2261 (daily ed., Mar. 21, 1978) (remarks of Mr. Quillen).

> [The amendments proposed by the Chairman of the House Administration Committee] . . . ignore transferability between party committees, and would seem not to uncouple the authorities of national and congressional committees which have been combined in H.R. 11315.
>
> The amendment of the gentleman from Illinois (Mr. Mikva) does restore transferability between party committees, but lacks the guarantee of the majority leadership. The minority would be foolhardy, indeed, to trust to agreements between ad hoc groups.
>
> The history of this bill indicates a majority attempt to disadvantage the minority at every turn.

Id. at H. 2263 (remarks of Mr. Frenzel).

> . . . [I]f there is anything more important, more fundamental, to the very integrity of our political system and our government process, it is the continued viability of our political parties. . . .
>
> The fact is in the last two weeks we have been faced with a fundamental assault on the very integrity, the continued viability, the continued meaningful role of our political parties . . . I would urge that the rule be defeated and that it be defeated so that we can, once and for all, send a very firm message to the Committee on House Administration to improve the campaign and election process, yes; but leave the political parties alone, and design the reforms and changes in a manner that will strengthen them and not weaken them.

Id. at H. 2264 (remarks of Mr. Stockman).

> Assurances have not been forthcoming from the leadership on the other side that the Republican party will

be put in the status quo it enjoyed before this whole unfortunate affair came up, the issue of transferability specifically being an issue on which assurances have not been given by any member except the gentleman from Illinois (Mr. Mikva) . . .

Id. at H. 2265 (remarks of Mr. Conable).

. . . I deeply regret that the committee in its wisdom saw fit to change the party financing. I can assure my colleagues on the Republican side that I and my colleagues will do all we can—and it represents a lot of votes—to restore the Republican Party financing to what it was before the change in the law.

Id. at H. 2265 (remarks of Mr. Mikva).

[H.R. 11315] says that our [Democratic] party has not done its job in fulfilling its obligation to raise money. So what do we do? We come in and try to place limitations on it.

. . .

The problems is that our party did not do the job, so we changed the rules in the middle of the ball game.

Id. at H. 2266 (remarks of Mr. Davis).

. . . when we passed the bill in 1972 which created the Federal Election Commission, a lot of people thought that the Republican Party's ability to raise money had been done in. Actually, we took that law and did a better job of it than the Democrats did . . .

We went out and started mailing appeals to people, very frankly, and we were able to get 1,300,000 people to contribute to the Republican party an average of $25 or less.

> Now, what the House Administration Committee has done here is to keep these people - and they are little people - from having their money, which they contributed freely, spent to elect Congressmen to represent them. . . .

Id. at H. 2267 (remarks of Mr. Rhodes).

Despite a late offer by the Majority Leader which would have allowed the Republican Party to continue making expenditures on behalf of its candidates at the then—existing levels,[6] the Rule by which H.R. 11315 would have been considered was defeated by a vote of 209-198.

V. SUMMARY

For the third time, the Commission is asked to rule that the National Republican Senatorial Committee has violated (and, in this case, is about to violate)[7] the Act by

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6. [The Chairman of House Administration] has agreed . . . to drop that provision from the bill which is most distasteful to the gentleman from Arizona. Really and truly, we ought not craft a bill deliberately in a way that would predetermine the outcome of an election as between one party and another. I will join this pledge . . . We will continue to allow the Republican Party to give just as much money as it has been giving directly to its candidates under existing law. We will make no change that denies them that right. . . 124 Cong. Rec. H. 2268 (daily ed., March 21, 1978) (remarks of Mr. Wright).

7. If the Commision were to reverse its former determination and find that NRSC's past practice of making § 441a(d) expenditures pursuant to a "dual" agency was in violation of the Act, we still would perceive some difficulty in seeking to enjoin NRSC from so acting with regard to the 1980 general elections.

In order for a party to obtain the drastic remedy of injunction it must demonstrate that the injury it fears is imminent; that it is presently threatened; or that it will occur immediately. It is not enough to show an abstract or nebulous plan to possibly commit a wrong sometime in the future; or to show the mere apprehension of injury that is liable to occur at some indefinite time in the future.

Complainant DSCC has not demonstrated, with even the slightest degree of certainty, that NRSC will make § 441a(d) expenditures pursuant to "dual agencies" in connection with the 1980 general election.

making Section 441a(d) expenditures as the agent of a Republican State Committee and, consequently, making such expenditures in an amount in excess of those permitted in acting only as the agent of the Republican National Committee.

We believe that the principle ennunciated in AO 1976-108, as applied in MUR's 780 and 820, is sound. The fact that the House of Representatives was unable to reach the result which complainant now would have the Commission accomplish is all the more reason for declining to reverse the findings of no reason to believe in the aforementioned MUR's.

VI. RECOMMENDATIONS

1. Find no reason to believe that the National Republican Senatorial Committee violated the Act in making expenditures, under 2 U.S.C. § 441a(d)(3), as agent of both the Republican National Committee and of a Republican State Committee.
2. Close the file in this matter.
3. Send attached letters of notification.

APPENDIX E

Judgment Entry of the Court of Appeals for the District of Columbia Circuit

(Filed October 9, 1980)

No. 80-2074

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
September Term, 1980

DEMOCRATIC SENATORIAL CAMPAIGN COMMITTEE,
Appellant,

v.

FEDERAL ELECTION COMMISSION,
NATIONAL REPUBLICAN SENATORIAL COMMITTEE,
Intervenor.

Appeal from the United States District Court for the District of Columbia.

Before: WRIGHT, *Chief Judge*, and WILKEY and GINSBURG, *Circuit Judges*

JUDGMENT

THIS CAUSE came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel.

ON CONSIDERATION THEREOF It is ordered and adjudged by this Court that the judgment of the District Court appealed from in this cause is hereby reversed and the

Commission is directed to conform with this decision forthwith, in accordance with the opinion of this Court filed herein this date.

Per Curiam
For the Court
/s/ GEORGE A. FISHER
Clerk

Opinion for the Court per curiam
Dissenting opinion filed by Circuit Judge Wilkey

APPENDIX F

Order of the United States Court of Appeals Denying Petition for Rehearing

(Filed October 11, 1980)

No. 80-2074

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
September Term, 1980

DEMOCRATIC SENATORIAL CAMPAIGN COMMITTEE,
Appellant,

v.

FEDERAL ELECTION COMMISSION,
NATIONAL REPUBLICAN SENATORIAL COMMITTEE,
Intervenor.

Before: WRIGHT, *Chief Judge,* and WILKEY and GINSBURG, *Circuit Judges*

ORDER

Upon Consideration of intervenor's petition for rehearing and of its application to recall mandate, it is

ORDERED, by the Court, that intervenor's petition and its application are denied.

Per Curiam
For the Court:
/s/ GEORGE A. FISHER
Clerk

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Order of the United States Court of Appeals Denying Rehearing En Banc

(Filed October 11, 1980)

No. 80-2074

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
September Term, 1980

DEMOCRATIC SENATORIAL CAMPAIGN COMMITTEE,
Appellant,

v.

FEDERAL ELECTION COMMISSION,
NATIONAL REPUBLICAN SENATORIAL COMMITTEE,
Intervenor

BEFORE: WRIGHT, *Chief Judge;* MCGOWAN, TAMM, ROBINSON, ROBB, WILKEY, WALD, EDWARDS, and GINSBURG, *Circuit Judges*

ORDER

The suggestion for rehearing *en banc* filed herein by intervenor having been transmitted to the full Court and a majority of the judges in regular active service not having voted in favor thereof, it is

ORDERED, BY THE COURT, *EN BANC,* that intervenor's aforesaid suggestion for rehearing *en banc* is denied.

Per Curiam
For the Court:
/s/ GEORGE A. FISHER
Clerk